TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted]

CHARLIE MIDDLETON, PLAINTIFF IN ERROR,

vs.

TEXAS POWER AND LIGHT COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE [redacted] SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED [illegible], 1939.

(35,704)

(25,704)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 874.

CHARLIE MIDDLETON, PLAINTIFF IN ERROR,

vs.

TEXAS POWER AND LIGHT COMPANY.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1917.

1 *Caption.*

Be it remembered that at a term of the Court of Civil Appeals of the 3rd Supreme Judicial District of Texas, begun and holden on the first Monday in October, A. D. 1914, and ending on the first Monday in July A. D. 1915, and at a subsequent term of said court to-wit: beginning on the first Monday in October A. D. 1915, and ending on the first Monday in July A. D. 1916, the following among other proceedings were had to-wit: Charlie Middleton Appellant, vs. Texas Power and Light Company, Appellee, No. 5408. Appealed from District Court of McLennan County, Texas, May 31st, 1916. Judgment affirmed.

2 *Caption.*

THE STATE OF TEXAS,
County of McLennan:

At a term of the District Court for the Nineteenth Judicial District of Texas, in and for McLennan County, begun and holden in the City of Waco, on the 5th day of January, A. D. 1914, and ending on the 4th day of April, A. D., 1914, the Honorable Tom L. McCullough, Judge, present and presiding, when the following cause came on for trial.

No. A-3947.

CHARLES MIDDLETON

vs.

TEXAS POWER & LIGHT COMPANY.

3 *Pl'ff's Original Petition.*

Filed 12/23/1913.

In the District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Now comes Charley Middleton, hereinafter called plaintiff, complaining of the Texas Power & Light Company, hereinafter styled defendant, and for cause of action represents and shows unto the Court:

1.

That the plaintiff is a resident citizen of McLennan County, Texas, and was at the time of the injuries hereinafter complained of; that defendant, the Texas Power & Light Company, is a corporation duly and legally incorporated under and by virtue of the laws of the State of Texas, and doing a general electric and gas business within the City of Waco, McLennan County, Texas.

2.

Further plaintiff says that on or about the 6th day of December, A. D. 1913, he was in the employ of the defendant company at its power house within the city of Waco, and that while in the employ of said Company the pipes containing the steam burst, badly scalding and injuring your petitioner without any fault or negligence on the part of your petitioner whatever.

3.

Plaintiff alleges that defendant company was guilty of negligence in that its agents, servants and employees caused cold water to be run into the pipes, which caused their breaking and the injuries suffered by plaintiff by reason thereof, which act on the part of the employees of the defendant company, was negligence and which was the direct and proximate cause of the plaintiff's injuries, as hereinafter more specifically complained of.

4 4.

Plaintiff further says that the pipes containing said steam were old, worn and decayed and were not of sufficient strength as should have been used by said company, and that on account of the worn out and decayed condition of said pipes the same would not hold the steam attempted to be carried through the same, all of which was negligence on the part of the defendant, its agents servants and employees, and which was the direct and proximate cause of the injuries received by the plaintiff.

5.

Plaintiff further says that on or about the day and date in question he was working as helper and assisting in the running of said power house when the said pipes above referred to exploded, burning your petitioner's right arm, right side and right leg and particularly injuring his hip, which said injuries petitioner alleges are permanent, and all of which was due to the negligence of defendant company, its agents, servants and employees.

6.

Plaintiff further says that on account of the injuries received he was confined to his bed for a long period of time and that he suf-

fered great mental and physical pain and anguish, all to plaintiff's great damage in the sum of $5,000.00.

7.

Plaintiff further says that on account of the injuries so received he has incurred a doctor's bill in the sum of $— which said sum is reasonable and necessary and for which plaintiff here now prays judgment.

Wherefore, premises considered plaintiff prays the Court that defendant company be cited in terms of law to appear and answer herein and that upon final hearing hereof he have judgment in the full sum of $5,000.00, together with such other and
5-7 further relief, both general and special, in law and equity, as he may show himself justly entitled.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Filed December 23rd, 1913. R. V. McClain, Clerk D. C. McL. Co. Tex.

Plff's 1st Supplemental Petition.

Filed 2/6/14.

In the 19th District Court, McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Now comes the Plaintiff, Charles Middleton, in the above entitled and numbered cause, and with leave of the Court first had and obtained, files this his First Supplemental Petition in answer to and in replication of defendant's original answer, filed herein on the 2nd day of February, A. D. 1914, and by way of supplemental petition alleges and says:

1.

This plaintiff demurs generally to the matters and things alleged in the defendant's original answer and says that the same are in-

sufficient in law and constitute no defense to this cause of action, and of this plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

* * * * * * *

8 In the 19th District Court of McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

vs.

TEXAS LIGHT & POWER COMPANY.

5.

By way of further special exception herein plaintiff says that paragraph 1 of the defendant's original answer filed herein, is insufficient in law, in that the said Texas Employers' Liability Act, upon which the defendant relies herein in support of its plea in abatement is unconstitutional, void, without binding force and effect upon the plaintiff, for the reasons that Act is in direct conflict with and violation of Section 3 of Art. 1, of the Constitution of the State of Texas; and further because said Texas Employers' Lia-
9 bility Act directly and specifically violates and conflicts with the 14th amendment of the constitution of the United States of America, guaranteeing equal protection of the laws to all citizens and prohibiting class legislation, and of this plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

In the 19th District Court of McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

vs.

TEXAS LIGHT & POWER COMPANY.

6.

Plaintiff further specially excepts to paragraph 1 of the defendant's original answer filed herein, for the reason that the said Texas

Employers' Liability Act, under the terms and by virtue of which defendant alleges its cause of action and said plea in abatement, is unconstitutional, void and without binding force and effect upon this plaintiff, for the reason that the said Act is in violation of the 14th Amendment of the Constitution of the United States of America in that the same is a confiscation of the property of the individual without due process of law, and of this plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

In the 19th District Court of McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

vs.

TEXAS LIGHT & POWER COMPANY.

7.

Further specially excepting to paragraph 1 of the defendant's original answer filed herein, this plaintiff says that the same is insufficient in law because said Texas Employers' Liability
10 & 11 Act relied upon by the defendant in support of its plea in abatement is unconstitutional, void and without binding force and effect upon this plaintiff for the reason that it deprives the individual of his liberty without due process of law all of which is in direct violation of and conflict — and repugnant to the 14th Amendment of the Constitution of the United States of America to Section 17 of Art. I of the Constitution of the State of Texas; for all of which plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

In the 19th District Court of McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

VS.

TEXAS POWER & LIGHT COMPANY.

8.

Further specially excepting to the defendant's original answer this plaintiff says that paragraph 1 of said answer is insufficient in law in that the said Texas Employers' Liability Act relied upon by the defendant for the abatement of this cause of action is unconstitutional, void and without binding force and effect upon this plaintiff for the reason that said Texas Employers' Liability Act is an interference with the rights of an individual to contract, all of which is prohibited by law and which is a well recognized principal enunciated by and prohibited by the Courts against any unlawful restriction; of this plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS.
Attorneys for Plaintiff.

* * * * * * *

12-26 In the District Court of McLennan County, Texas, January Term, A. D. 1914.

No. A-3947.

CHAS. MIDDLETON

VS.

TEXAS POWER & LIGHT COMPANY.

11.

By way of further special exception herein plaintiff says that paragraph 1 of the Defendant's Original Answer is insufficient in law in that the said Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement is unconstitutional, void and of no binding force and effect upon this plaintiff, because said act is in abrogation of the common law right of action on the part of the parties hereto, which is in conflict with and in violation of the inherent rights of action and further because said act deprives the parties hereto of their rights to have the liability of the defend-

ant and the rights of the plaintiff on account thereof, by reason of the injuries received by the said plaintiff as alleged, determined by a Court of law, and of this plaintiff prays judgment of the Court.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

* * * * * * *

27 Wherefore, in view of the foregoing plaintiff says that the said plea in abatement is not well taken and should be set aside and held for naught for the reasons as hereinafter set out and plaintiff prays the Court that said plea in abatement be stricken out and this cause proceed to trial upon its merits.

J. E. YANTIS,
CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Filed Feb'y 6th 1914. R. V. McClain, Cl'k D. C.

* * * * * * *

Def't's 1st Amended Original Answer.

Filed 2/6/14.

28 In the District Court, McLennan County, Texas, January Term, 1914.

No. A-3947.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT COMPANY.

Now comes the defendant by its attorneys, and leave of the Court first having been had and obtained, files this its First Amended Original Answer in amendment and in lieu of its original answer filed herein on the — day of —— A. D. 1914, and for amendment says:

I.

And the said defendant by its attorney comes and says that this Court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because it says:

That at the time of the accident to the plaintiff as alleged in his

original petition the said plaintiff was an employee of this defendant and in its service under contract of hire; that the said plaintiff at the time of said accident was neither a domestic servant or farm laborer; nor an employee of any person, firm or corporation
29 operating any railroad as a common carrier; nor was he engaged in working for a cotton gin.

That at the time of said accident, and at the time of the filing of plaintiff's petition herein, and now, this defendant was an employer of labor in the State of Texas; and then and now had and has in its employment more than five employees; and that at said several times and now was and is the holder of a policy of liability and compensation insurance issued in its favor by the Ætna Life Insurance Company of Hartford, Conn., having paid a year's premium in advance and received a receipt therefor, which insurance company at said several times and now was and is lawfully transacting a liability and compensation insurance business in the State of Texas, with a permit to do business as is provided for by law and a license, as is provided for by the Act of the Thirty-Third Legislature, Chapter 179, authorizing the organization of the "Texas Employees" Insurance Association; said policy being conditioned to pay the compensation provided for by the Texas Workmen's Compensation Act (Chapter 179 of the Acts of the Thirty-Third Legislature), of which fact the said plaintiff herein was given and had notice in writing and print as soon as said policy was secured, and notice of the fact that it had provided for the payment of the compensation for injuries by said Insurance Company as provided for by the provisions of said Texas Workmen's Compensation Act was given to said plaintiff in writing and print.

That no claim for compensation as provided in said act with respect to the injury alleged to have been suffered by the said plaintiff has been made by said plaintiff or any one acting for him either to this defendant or to said Insurance Company. On the contrary, the said plaintiff by and through his attorney has refused to receive the compensation with respect to his alleged injury provided for by said Act; and has refused to recognize said Act.

30 Defendant further says that no question arising under said Act has been referred to or determined by the Industrial Accident Board created under and by virtue of the provisions of said Act.

Defendant further says that a report of the accident to Plaintiff was made in writing by this defendant to the Industrial Accident Board as required by the provisions of the Texas Workmen's Compensation Act.

Defendant further says that the said Ætna Life Insurance Company has a local agent in the State of Texas, to-wit: E. W. Marshall & Company, who reside in the County of McLennan in said State of Texas and all of these matters the said Defendant is ready to verify.

Wherefore, the premises considered, the said defendant prays judgment whether this court can or will take any further cognizance of the action of the said plaintiff aforesaid; that said action aforesaid of the said plaintiff be dismissed and that this defendant go hence

without day and recover of plaintiff all its costs in this behalf expended.

HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for the Defendant.

THE STATE OF TEXAS,
County of McLennan:

On this day personally appeared before me, the undersigned authority, Harry P. Lawther, who, being by me duly sworn, upon his oath says that he is the attorney for the Texas Power & Light Company; and that the matters and things stated in the foregoing answer are true.

HARRY P. LAWTHER.

Subscribed and sworn to before me this 5th day of January, A. D. 1914.

CHAS. T. McCORMICK,
Notary Public, Dallas County, Texas.

II.

Further answering, the said defendant by its attorneys comes and says that the said Plaintiff's Original Petition is insufficient in law; and of this it prays judgment of the Court.

31 HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for the Defendant.

* * * * * * *

32 Filed Feb'y 6th, 1914. R. V. McClain, Cl'k D. C. McL. Co.

Judgment.

In 19th District Court, McLennan County, Texas.

No. A-3947.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT COMPANY.

On this the 6th day of February, A. D. 1914, the above styled and numbered cause came on for trial; and thereupon came on to be considered the said defendant's plea in abatement to the plaintiff's cause of action; and a jury being waived thereupon came on to be considered plaintiff's general and special exceptions Nos. 1 to 28 in-

clusive to the said defendant's plea in abatement; and the
33 & 34 court, having considered the same, and being of the opinion
clusive to the said defendant's plea in abatement; and the special demurrer, it is the opinion of the Court that the same should be overruled. It is, therefore, ordered, adjudged and decreed that the said plaintiff's general demurrers Nos. 1 to 28 inclusive to the said defendant's plea in abatement, be and the same are hereby, overruled; and by agreement of the parties evidence in support of said plea in abatement being waived and the facts therein stated having been agreed to be true, it is the opinion of the Court that it should take no further cognizance of the action of the said plaintiff aforesaid, and it is accordingly ordered, adjudged and decreed that the said plaintiff's action aforesaid be, and the same is, hereby dismissed; and that the said defendant go hence without day and recover of the plaintiff all its costs in this behalf expended, for which it may have its execution: To which action of the Court in overruling the said plaintiff's general and special demurrers and sustaining the said defendant's plea in abatement and dismissing the suit, the plaintiff in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District at Austin.

Pl'tff's Motion for New Trial.

Filed 2/6/14.

In the 19th District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Now comes the plaintiff in the above entitled and numbered cause and moves the Court to set aside the judgment heretofore rendered herein on the 6th day of February, A. D. 1914, and to grant a new trial and reinstate said cause for the following reasons, to-wit:

1.

Because the court erred in overruling plaintiff's general demurrer to the plea in abatement filed herein by the defendant.

* * * * * * *

35-37 6.

Because the court erred in overruling plaintiff's special exception No. 5 to the plea in abatement filed by the defendant herein.

7.

Because the coury erred in overruling plaintiff's special exception No. 6 to the plea in abatement of the defendant filed herein.

8.

Because the court erred in overruling plaintiff's special exception No. 7 to the plea in abatement of the defendant filed herein.

9.

Because the court erred in overruling the plaintiff's special exception No. 8 to the plea in abatement of the defendant filed herein.

* * * * * * *

12.

Because the court erred in overruling plaintiff's special exception No. 11 to the plea in abatement of the defendant filed herein.

* * * * * * *

38 Wherefore premises considered, plaintiff prays the court to set aside the judgment heretofore rendered herein by the court and to re-instate said cause and grant a new trial hereof.

CHAS. B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Filed Feb'y 6th, 1914. R. V. McClain, Cl'k D. C.

Order Overruling Pl'tiff's Motion for New Trial.

In the 19th District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

On this the 6th day of February, A. D. 1914 came on to be heard the plaintiff's motion for a new trial in the above styled and numbered cause, and the Court having had said motion presented and having heard the arguments of counsel, and being advised as to the law, is of the opinion that said motion is not well taken and should in all things be overruled.

It is therefore ordered, adjudged and decreed by the court that the plaintiff's motion for a new trial be and the same is in all things

overruled; to which action of the court in overruling said motion for a new trial the plaintiff then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas.

TOM L. McCULLOUGH, *Judge.*

Pl't'ff's Bill of Exception No. 1.

F'l'd 2/24/14.

In the 19th District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered, that upon the trial of the above entitled and numbered cause the following proceedings were had, to-wit:

39-44 The above entitled and numbered cause was regularly called in the above Court on the 6th day of February, A. D., 1914, when both parties announced ready.

Whereupon, the plaintiff presented to the Court the following general demurrer to the defendant's plea in abatement filed herein:

"This plaintiff demurs generally to the matters and things alleged in the defendant's original answer and says that the same are insufficient in law and constitute no defense to this cause of action, and of this plaintiff prays judgment of the Court."

Which demurrer was by the Court overruled, to which action of the court in overruling said demurrer the plaintiff then and there in open court excepted and here now tenders this his bill of exception No. 1, and prays that the same may be examined, signed, and by the Court approved, and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

Y. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Presented and agreed to by
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct and signed and approved and ordered filed as a part of the record in this cause this 6th day of February, A. D. 1914.

TOM L. McCULLOUGH,
Judge 19th Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Texas.

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45 *Pl'tff's Bill of Exception No. 5.*

F'l'd 2/24/14.

In the 19th Judicial District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to-wit:

The above entitled and numbered cause was regularly called in the above Court on the 6th day of February, A. D. 1914, when both parties announced ready.

Whereupon the plaintiff presented to the Court the following special exception to the defendant's plea in abatement filed herein:

"By way of further special exception herein plaintiff says that paragraph 1 of the defendant's original answer filed herein, is insufficient in law, in that said Texas Employers' Liability Act, upon which the defendant relies herein to support its plea in abatement, is unconstitutional, void and without binding force and effect upon the plaintiff, for the reason that said Act is in direct conflict with and violation of Section 3 of Article 1 of the Constitution of the State of Texas; and further, because said Texas Employers' Liability Act directly and specifically violates and conflicts with the 14th Amendment of the Constitution of the United States of America, guaranteeing equal protection of the laws to all citizens, and prohibiting class legislation, and of this plaintiff prays judgment of the Court."

Which special exception was by the court overruled, to which action of the court in overruling said special exception the plaintiff then and there in open Court excepted, and here now tenders this his bill of exception No. 5 and prays that the same may be examined, signed, and by the Court approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

46 Presented and agreed to by
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct, signed and approved and ordered filed as a part of the record in this cause this 6th day of February, A. D., 1914.

TOM L. McCULLOUGH,
Judge of 19th Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Tex.

Pl't'ff's Bill of Exception No. 6.

F'l'd 2/24/14.

In the District Court of McLennan County, Texas.

No. A-3947.

CHARLES MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had to-wit:

The above entitled and numbered cause was regularly called in the above Court on the 6th day of February, A. D. 1914, when both parties announced ready.

Whereupon the plaintiff presented to the Court the following special exception to the defendant's plea in abatement filed herein:

"Plaintiff further specially excepts to paragraph 1 of the defendant's original answer filed herein for the reason that the said Texas Employers' Liability Act under the terms and by virtue of which defendant alleges its cause of action and said plea in abatement, is unconstitutional, void and without binding force and effect upon this plaintiff for the reason that the said Act is in violation of the 14th Amendment of the Constitution of the United States of America, in that the same is a confiscation of the property of the individual without due process of law, and of this plaintiff prays judgment of the Court."

Which special exception was by the Court overruled, to which action of the Court in overruling said exception the plaintiff then and there in open court excepted, and here now tenders this his bill of exception No. 6, and prays that the same be examined,
47 signed, and by the Court approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Presented and agreed to by
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct, signed and approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

TOM L. McCULLOUGH,
Judge 19th Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Tex.

Pl'ff's Bill of Exception No. 7.

F'l'd 2/24/14.

In the District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to-wit:

The above entitled and numbered cause was regularly called in the above Court on the 6th day of February, 1914, when both parties announced ready.

Wherefore the plaintiff presented to the Court the following special exception to the defendant's plea in abatement, filed herein:

"Further specially excepting to paragraph 1 of the defendant's original answer filed herein, this plaintiff says that the same is insufficient in law because said Texas Employers' Liability Act, relied upon by the defendant in support of its plea in abatement is unconstitutional, void and without binding force and effect upon the plaintiff, for the reason that it deprived the individual of his liberty without due process of law, all of which is in direct violation of
48 and conflict with and repugnant to the 14th Amendment of the Constitution of the United States of America, to Section 17 of Article 1 of the Constitution of the State of Texas, for all of which plaintiff prays judgment of the Court."

Which special exception was by the court overruled, to which action of the Court in overruling said special exception the plaintiff then and there in open court excepted, and here now tenders this his bill of exception No. 7, and prays that the same be examined, signed, and by the court approved, and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Presented and agreed to by:
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct and signed and approved and ordered filed as a part of the record in this cause this 6th day of February, A. D. 1914.

TOM L. McCULLOUGH,
Judge 19th Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Tex.

Pl'ff's Bill of Exception No. 8.

F'd 2/24/14.

In the 19th District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to-wit:

The above entitled and numbered cause was regularly called in the above court on the 6th day of February, A. D. 1914, when both parties announced ready.

49-51 Whereupon the plaintiff presented to the Court the following special exception to the defendant's plea in abatement filed herein:

"Further special excepting to the defendant's original answer this plaintiff says that paragraph 1 of said answer is insufficient in law in that the said Texas Employers' Liability Act relied upon by the defendant for the abatement of this cause of action, is unconstitutional, void and without binding force and effect upon the plaintiff for the reason that said Texas Employers' Liability Act is an interference with the rights of an individual to contract, all of which is prohibited by the Courts against any unlawful restriction of this plaintiff prays judgment of the Court."

Which special exception was by the Court overruled, to which action of the Court in overruling said special exception the plaintiff then and there in open court excepted, and here now tenders this his bill of exception No. 8, and prays that the same be examined, signed, and by the Court approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Presented and agreed to by:
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct and signed and approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

TOM L. McCULLOUGH,
Judge 19th Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Tex.

* * * * * * *

52 *Pl'ff's Bill of Exception No.* 11.

F'l'd 2/24/14.

In the District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Be it remembered that upon the trial of the above entitled and numbered cause the following proceedings were had, to-wit:

The above entitled and numbered cause was regularly called in the above Court on the 6th day of February, 1914, when both parties announced ready.

Whereupon the Plaintiff presented to the Court the following special exception to the defendant's plea in abatement, herein filed:

"By way of further special exception herein plaintiff says that paragraph 1 of the defendant's original answer is insufficient in law in that the said Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement is unconstitutional, void and of no binding force and effect upon this plaintiff, because said Act is in abrogation of the common law right of action
53–78 on the part of the parties hereto, of their right to have the liability of the defendant and the rights of the plaintiff on account thereof, by reason of the injuries received by said plaintiff as alleged, determined by a court of law and of this plaintiff prays judgment of the Court.

Which special exception was by the Court overruled, to which action of the court in overruling said special exception the plaintiff then and there in open court excepted and here now tenders this his bill of exception No. 11, and prays that the same be examined, signed and

by the Court approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Presented and agreed to by:
HARRY P. LAWTHER,
SPELL & SANFORD,
Attorneys for Defendant.

This bill of exception examined, found correct, signed and approved and ordered filed as a part of the record in this cause, this 6th day of February, A. D. 1914.

TOM L. McCULLOUGH,
Judge Nineteenth Judicial District of Texas.

Filed Feb. 24th, 1914. R. V. McClain, Cl'k D. C. McL. Co., Tex.

* * * * * * *

79 & 80 *Assignments of Error.*

F'l'd 4-28-14.

In the 19th District Court, McLennan County, Texas.

No. A-3947.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Now comes Charley Middleton, the plaintiff, and files the following assignments of error:

* * * * * * *

81 5.

The Court erred in overruling plaintiff's special exception No. 5, to the defendant's plea in abatement for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said act is in direct conflict with section 3 of Article 1 of the Constitution of the State of Texas and further because the said act directly and specifically violates and conflicts with the 14 Amendment of the Constitution of the United States, guaranteeing equal protection of the laws to all citizens and prohibiting class legislation.

6.

The Court erred in overruling plaintiff's special exception No. 6 to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement is unconstitutional, and without binding force and effect upon this plaintiff, because the said act is in violation of the 14 amendment of the Constitution of the United States, in that the same is a confiscation of the property of the individual without due process of law.

7.

The Court erred in overruling plaintiff's special exception No. 7 to the defendant's plea in abatement, for *for* the rea-
82 son that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon this plaintiff, because it deprives the individual of his liberty without due process of law all of which is in direct conflict with and violation of the 14th Amendment of the Constitution of the United States, and Section 17 article 1 of the Constitution of the State of Texas.

8.

The Court erred in overruling plaintiff's special exception No. 8 to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in its support of its plea in abatement, is unconstitutional and without binding force and effect upon this plaintiff because the said act is an interference with the rights of an individual to contract, all of which is prohibited by law and which is a well recognized princi*pal* enunciated by and prohibited by the courts against any unlawful restrictions.

* * * * * * *

10.

The Court erred in overruling plaintiff's special exception No. 11 to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in
83 & 84 support of its plea in abatement, is unconstitutional and without binding force and effect upon this plaintiff, because said act is in abrogation of the common law right of action on the part of the parties hereto.

* * * * * * *

85

J. E. YANTIS,
CHARLES B. BRAUN,
WITT & SAUNDERS,
Attorneys for Plaintiff.

Filed April 28th, 1914. R. V. McClain, Cl'k D. C.

Appeal Bond.

Filed 2/6/14.

In the District Court of McLennan County, Texas.

No. A-3947.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Whereas, in the above styled and numbered cause pending in the Nineteenth District Court of McLennan County, Texas, and at a regular term of said Court, to-wit: on the 6th day of February, A. D. 1914, said cause was called for trial; and

Whereas, the said defendant, the Texas Power & Light Company, presented its plea in abatement to the plaintiff's cause of action; and,

Whereas, the said plea in abatement was by the Court sustained and a judgment of dismissal against the plaintiff, Charlie Mid-
86 dleton, was entered by the Court, to which action of the Court in sustaining said plea in Abatement and dismissing the plaintiff's cause of action. The plaintiff then and there excepted and gave notice of appeal *for* the Third Supreme Judicial District of Texas, at Austin, Texas, from which order of the Court in sustaining said plea in abatement of the said defendant, the Texas Power & Light Company, and from the judgment of the court in dismissing the plaintiff's said cause of action, the said plaintiff, Charlie Middleton, has taken an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, in the County of Travis, Texas.

Now, therefore, we, Charlie Middleton, as principal, and J. M. Panland and Jno. H. McGlasson as sureties, acknowledge ourselves bound to pay unto the said Texas Power & Light Company the sum of Two Hundred and Fifty ($250.00) Dollars conditioned that the said Charlie Middleton, appellant shall prosecute his appeal with effect and shall pay all the costs which have accrued in the court below and which may accrue in the Court of Civil Appeals and the Supreme Court.

Witness our hands at Waco, Texas this — day of February, A. D. 1914.

CHARLIE MIDDLETON, *Principal*
J. M. PENLAND,
JNO. H. CAROTHERS,
Sureties.

I have fixed the probable amount of the costs in the Court of Civil Appeals, the Supreme Court, and the court below at One Hundred Dollars, and approve the foregoing bond this 6th day of February, A. D. 1914.

R. V. McCLAIN,
Clerk 19th Judicial District Court
of McLennan County, Texas.

Filed Feb'y 6th, 1914. R. V. McClain, Cl'k D. C.

87 *Bill of Costs.*

Clerk's Fees.

File & Docket	$ .35
Citations	1.25
Appearance	.30
Bond Approved	1.50
Continuances	1.00
Assessing damages	.50
Recording returns	.50
Fil. & Dock. Motions	.30
Files	4.85
Orders on motion	.75
Entering judgment	1.00
Tax. Cost & copy	.25
Transcript	55.20
	$67.75

Sheriff's Fees.

Serving Cit. & Mil	.85
Steno. fee	3.00

Recapitulation.

Clerk's fees	$67.75
Sheriff's fees	.85
Steno. fee	3.00
	$71.60

THE STATE OF TEXAS,
County of McLennan:

I, R. V. McClain, Clerk of the District Court, in and for McLennan County, Texas, hereby certify that the above and foregoing is a true and correct transcript of all the proceedings had and done in cause No. A-3947, Charley Middleton vs. Texas Power & Light Company, as all of the same appear of record and on file in my office.

Witness my hand and seal of said Court, at office in the city of Waco, this the 29th day of April, A. D. 1914.

[SEAL.] R. V. McCLAIN,
Clerk District Court, McLennan County, Texas,
By MARY GOLDBERG, *Deputy.*

88 Endorsed: 5408—Charley Middleton, Appellant,—Plaintiff in Error, vs. Texas Power & Light Co., Appellee,—Defendant in Error. From District Court of McLennan County. Applied for by J. E. Yantis, Chas. Braun & Witt & Saunders, Attorneys for Appellant on the 6th day of February, 1914, and delivered

to Witt & Saunders on the 29th day of April, 1914. R. V. McClain, Clerk, District Court McLennan County, Texas. Filed in Court of Civil Appeals, at Austin, Texas, the 6th day of May, 1914. R. H. Connerly, Clerk, Court of Civil Appeals 3rd Supreme Judicial District of Texas. J. E. Yantis, Chas. Braun & Witt & Saunders, Attorney- for Appellant, Waco, Texas. Harry P. Lather & Speil & Sanford, Attorney- for Appellee, Waco, Texas. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, May 6th, 1914. R. H. Connerly, Clerk. Rev. & Rem. 1-20-15. Overruled 1-27-15. Feb. 3rd, 1915, order overruling motion for rehearing set aside & questions certified to Sup. Court.

89 *Judgment of Court of Civil Appeals.*

Rendered January 20th, 1915.

No. 5408.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT COMPANY.

Appeal from District Court of McLennan County.

Opinion by Chief Justice Key.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; that the appellee, Texas Power & Light Company, pay all costs in this behalf expended and this decision, with a copy of the opinion herein delivered, be certified below for observance.

Motion of Appellee for Rehearing.

Filed January 26th, 1915.

In Court of Civil Appeals, Third Supreme Judicial District.

CHARLEY MIDDLETON, Appellant,

versus

TEXAS POWER & LIGHT COMPANY, Appellee.

Motion of Appellee for a Rehearing.

Appellee, Texas Power & Light Company, moves herein for a rehearing, and prays that the judgment of the court herein rendered

on January 20, 1915, reversing and remanding this cause
90 be set aside, and the judgment of the District Court affirmed, because of the error of the court in holding that the Act of April 16, 1913, pages 429 to 438, General Laws of 1913, is unconstitutional in part, the error of the court particularly consisting in holding that the fact that employers have an option to adopt and act under said law, and that employes had no such option constituted a violation of the constitutions of the United States and of the State of Texas.

In the alternative, appellee prays that the judgment of this court be set aside, and the issue of whether or not the act aforesaid is unconstitutional be certified to the Supreme Court.

Counsel for appellant are Witt & Saunders and Chas. B. Braun, who reside at Waco, Texas.

H. P. LAWTHER,
BATTS & BROOKS,
Counsel for Appellee.

We waive notice of the above motion and agree that same may be submitted on Jan. 27, 1915, and the question involved may be certified.

WITT & SAUNDERS,
CHAS. B. BRAUN,
Counsel for Appellant.

(Endorsed:) Mo. 4414: Charley Middleton vs. Texas Power & Light Company. Appeal from McLennan County. Motion for a rehearing. Submitted and overruled 1/27/15. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jan. 26, 1915, R. H. Connerly, Clerk. Granted & Affirmed, 5/31/'16.

Order Made Feb. 3rd, 1915, Setting Aside Order Overruling Motion for Rehearing and Certifying Questions to Supreme Court.

Motion 4414. #5408.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT COMPANY.

Appeal from McLennan County.

The former order of this court entered in this cause on January 27th, 1915, overruling the motion for a rehearing is set aside and questions are certified to the Supreme Court of Texas.

91 No. 5804.

CHARLES MIDDLETON, Appellant,

vs.

TEXAS POWER & LIGHT COMPANY, Appellee.

Appeal from the District Court of McLennan County.

Opinion.

Appellant brought this suit against appellee, seeking to recover $5,000 as damages for injuries sustained by him while in the employ of appellee, which injuries he alleged were caused by appellee's negligence. Appellee filed a plea in abatement, showing that it, as an employer, had complied with the requirements of the Employers' Liability Act enacted by the 33rd Legislature, and asked that the suit be dismissed. In a supplemental petition appellant excepted to the plea referred to, charging that the Employers' Liability Act was unconstitutional and void. The trial court overruled the exceptions, sustained the plea in abatement, and dismissed the cause of action, and the appellant has prosecuted an appeal.

If that portion of the Employers' Liability Act which prescribes that when an employer has complied with the requirements of the act his employes shall have no right of action against him for damages for personal injuries is unconstitutional and void as to non-consenting employes, then the trial court committed error when it sustained the plea in abatement. The act referred to is too voluminous to be copied in full in this opinion, and we deem it sufficient to copy from appellant's printed argument the following synopsis of it:

"Chapter 179 of the general laws of the State of Texas passed by the thirty-third Legislature at its regular session, page 429, approved April 16, 1913, effective September 1st, 1913, is divided into four parts.

92 "Section 1, Part 1, abolishes certain common law defenses available to the employer in personal injury suits brought by an employe. Section 2 declares that the provisions of the act shall not apply to actions to recover damages for personal injuries sustained by certain classes of employes. Section 3 takes away any and all rights of action by employes of subscribers against their employer for damages for personal injuries, and provides that they shall look for compensation solely to certain insurance associations or companies, which, by subsequent terms of the law, the employer is allowed to contract with for the benefit of such employes. Section 4 excludes employes from participating in the benefits of the insurance organization, if their employers are not subscribers, and also declares their constitutional and common law right to bring suits against their employers. Section 5 relates solely to the recovery of exemplary damages. Sections 6 to 13 relate to the scale of compensation to be paid to the injured employe. For the pur-

poses under consideration, it is sufficient to note that section 6 provides that no compensation shall be paid for an injury which does not incapacitate the employe for a period of at least one week from earning full wages; that section 7 makes provisions for furnishing during the first week of reasonable medical aid, hospital services and medicine; that section 10 fixes a maximum and minimum amount to be paid weekly to an injured employe during a maximum period of time, while incapacity for work is total; section 11 has the same character of restrictions, while the incapacity for work is partial; that section 12 provides for certain compensation for certain specific injuries. By section 14 it is provided that no agreement of any employe to waive his rights to compensation under this act shall be valid.

"Part 2 of the act creates an Industrial Accident Board, with state-wide jurisdiction of the subject matter presented in the act. For the purposes under consideration it is sufficient to note, by section 4 of part 2, it is provided that the Board may re-
93 quire an employe claiming to have sustained injury, to submit himself to a physical examination; and that a refusal to do so shall deprive him of the right to compensation during the continuance of such refusal; that section 5 provides that, in the event an interested party is not willing to abide the final ruling and decision of the Board on any disputed claim, he may sue on such claim, or may require suit to be brought thereon in some court of competent jurisdiction; and that, in such suit, the rights and liabilities of the parties thereto shall be determined by the provisions of this act; that such suit shall be against the association and the recovery shall not exceed the maximum of compensation allowed under the provisions of this act.

"By Part 3, the 'Texas Employers Insurance Association' is created a body corporate, with powers provided for in subsequent sections of the act. Sections 19 and 20 of the act provide that subscribers shall give notice in writing or print to all persons under contract of hire with him, and to all persons about to enter into a contract of hire with him, that he has provided for payment of compensation for injuries to employes by the association.

"Part 4 defines the terms used generally in the act. Among other terms thus defined is "Association," which is declared to mean: 'The Texas Employers' Insurance Association,' or any other insurance company authorized under this act to insure the payment of compensation to injured employes or to the beneficiaries of deceased employes.' 'Subscriber' is also defined to mean 'Any employer who has become a member of the association by paying a year's premium in advance and received the receipt of the association therefor.' Section 2 of part 4 grants insurance companies, other than the Texas Employers' Association the right to insure the liability to pay the compensation provided for by the act, and imposes certain duties upon such companies. Section 4, part 4, provides that, should any 'part' of this act be, for any reason held to be invalid or inoperative, no other part or parts shall be

94 affected thereby, and if any exceptions to, or limitations upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective, the general provisions shall nevertheless stand effective and valid, as if it had been enacted without exception or limitation."

The Counsel who represent appellant have filed well prepared printed brief and argument, presenting quite a number of constitutional objections to the validity of the statute in question. Counsel for appellee, in printed brief and argument, manifesting equally as much ability and research, have undertaken to answer all of the objections referred to; and, in addition to this valuable assistance, the respective counsel made able oral arguments when the case was submitted.

This court has attempted to give the case that careful consideration which its importance demands, and the writer of this opinion has read every American decision construing employers' liability or workmen's compensation acts cited by counsel or otherwise found. In some of the states, if not in all, there seems to be great necessity and demand for legislation upon the subject referred to; and while this court is not required to commit itself upon any question of legislative policy, still, we feel that it is not improper to say that the evils sought to be cured by such legislation are wide-spread, and of such a nature as to justify the best efforts of statesmanship, in order that a law may be enacted which will afford substantial remedy without exceeding constitutional limitations.

Several of the states have already dealt with the question, and some of the provisions of their statutes, and the decisions construing them, may hereafter be referred to.

We have reached the conclusion that so much of the statute here involved as undertakes to deprive an employe of what otherwise would be his cause of action against his employer, is unconstitutional and void; but, as the jurisdiction of this court is not final, and as the case will go to the Supreme Court, we shall not undertake to decide other constitutional questions. Our reason

95 for holding that the provision of the statute referred to is unconstitutional is based upon the fact that it leaves it optional as to the employer, and makes it compulsory as to the employe, when the employer has elected to avail himself of the benefits of the statute. The Federal Constitution declares that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and our State Constitution, in section 3, article 1, in general terms, declares the equal rights of men. Section 19, art. 1, reads: "No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." The Constitution also vests in the legislature the exclusive power to make laws, and therefore that body has no power to delegate legislative authority to any private person. Undoubtedly, the statute here involved is optional as to the employer,—he has his choice and may or may not become a subscriber, pay

premiums, obtain insurance for the benefit of his employes, and thereby release himself from what would otherwise be his liability to such employes. It is true that if he does not pursue that course he loses some of his common-law defenses; but the fact remains that he has an option and may choose between two laws concerning himself and his employes and fixing their respective rights.

We think it is also quite clear that the statute is compulsory as to the employe and allows him no choice as to whether he will accept its terms, or claim his rights as they formerly existed according to the common-law. This being the case, we think it is clear that this statute, in so far as it undertakes, without his consent, to deprive an employe of his common-law right of action at the option of his employer, is violative of the constitutional provisions above referred to. True it is, in theory if not in fact, that every man has the privilege of declining to accept employment from any particular person or corporation; but if he pur-
96 sues that course and remains out of the employment of any employer who has accepted the terms and provisions of this statute, then he has not exercised any option as an employe. He has merely declined to become an employe. In several of the states which have legislated upon the subject it has been left optional with both employer and employe, and if the employer chooses to accept the terms of the law, his employe, without giving up his employment, may decline to accept under the statute and retain his common-law right of action against his employer. In some of the other states the law is compulsory as to both employer and employe. The Texas statute declares, in express terms, that when an employer has complied with its provisions, neither the employe nor his legal representatives shall have any right of action against him for injuries to such employe; and it makes no provision whereby the employe can exercise his option and either accept or reject that provision of the statute. In other words, the statute presents to the employe two laws, differing widely and radically concerning his liability to his employe, and permits him to choose, without the consent of his employe, which of those two laws shall fix the rights of his employe as against him. If he selects one of those laws, his employe can maintain an action against him and recover damages for personal injuries caused by his negligence, according to the common law as it existed before this statute was enacted; while if he selects the other law, by which a limited amount of compensation is to be paid to the injured employe by an insurance company, he, the employer, is relieved from liability, and an employe injured by his negligence can maintain no cause of action against him. It is true that if he pursues the latter course he is required to pay the premiums for insurance for the protection of his employes, but he is not required to make any change whatever in the conditions under which the employe works. The hazards to the employe may remain the same, while the employer, without the consent of the employe, has the option to substitute for his common-law lia-
97 bility insurance in behalf of the employe for a limited amount of compensation for injuries which he may sustain in the

course of his employment. Has the legislature the power to enact a law that embodies such a fundamental and far reaching discrimination in favor of the employer and against the employe? After careful and patient consideration we think it is clear that this question must be answered in the negative, and that feature of the statute be declared unconstitutional.

In Yick Wo vs. Peter Hopkins, 118 U. S. 220, 30 L. ed. 356, the Supreme Court of the United States held that an ordinance of the city of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits, without having first obtained the consent of the board of supervisors, except the same be located in a building construced of brick or stone, was in contravention of the 14th Amendment to the Constitution of the United States and void, and in the course of the opinion, the court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political; no appeal lying, except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the
98 pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

In that case it was held that it was not in the power of the state or any of its subordinate municipalities to confer upon a board (presumably of disinterested persons) the arbitrary power to determine whether or not a particular statutory enactment should apply to a particular person; and, for a higher and greater reason, it seems to us, that it must be held that it is beyond the domain of legislative power to confer upon any person authority to say what particular law, or which of two particular laws, shall govern his rights and the rights of his employe as between them. We are not

unmindful of the rule, supported by all the authorities, that legislation may be based upon reasonable classification; and when so done, and no discrimination is made among different members of a class, such legislation is not obnoxious to Federal and State constitutions. But the rule and the decisions referred to do not go to the extent of holding that, without doing anything to lessen the risk and hazards of the employment, an employer, without the consent of his employe, may, at his own option, substitute the liability of another for his own liability to the employe, and thereby release himself from all liability. Therefore it is no answer to say that the Texas statute affords equal rights, privileges and protection to the employers, as one class, and the employes, as another class, who come within the purview of its provisions. This statute is an
99 illustration of the fact that legislation may be so discriminatory and unjust as between classes as to bring it in conflict with those constitutional provisions which guarantee due process and equal protection of the laws. Nor does it suffice to say that the statute in question shows upon its face that it was enacted for the benefit of employes, and therefore the courts, in determining its validity, should assume that the employe who has an opportunity to avail himself of its benefits, has been benefitted and not injured, and consequently ought not to be heard to complain. Considering the schedules prescribed by this statute, the maximum amount per week that can be claimed by an injured employe, and the limited number of weeks compensation is allowed, and the fact that since the statute became effective on September 1st, 1913, about three thousand employers have availed themselves of its benefits, we are not prepared to say that no room exists for difference of opinion as to whether the statute will result in material benefit to employes considered in the aggregate; and it is quite clear, when considered in the concrete, and applied to this case, if the facts are as alleged in plaintiff's petition, he might reasonably and fairly obtain more compensation under the rules of the common law than he could obtain under this statute. But these considerations do not constitute a proper test of the validity of legislation conferring an option on the employer to decide which of two different rules of law shall govern as between himself and his employe. The validity or invalidity of such legislation does not rest upon what would be the result in a particular case. The insuperable objection is that it is not only contrary to the plainest dictates of right and justice that where the interest of persons may conflict, neither one should have the power to determine what rule of law should govern, but, under our form of government, any legislation which undertakes to confer upon any individual or class of individuals such a privilege violates constitutional provisions, both state and national. Such
100 legislation cannot justify itself in the forum of conscience, because it contravenes that rule of justice which forbids any man to act as judge or juror in his own case. It is immaterial that a particular man, in such circumstances, might disregard his own interest and decide the matter fairly. We do not make nor administer our laws upon the Utopian theory that any man will do

absolute justice by his fellow-man, although he may have a strong motive for acting otherwise. On the contrary, we make and endeavor to administer laws upon the theory that when men deal with each other they may not do that which justice and fair dealing dictates should be done. So, we know, as matter of common knowledge, that while, in a certain sense, the interest of capital and labor may be identical, still, when capital deals with labor in the concrete, if either has an opportunity to do so, it may drive a hard bargain and impose unjust hardships upon the other. It will be a sad day, if it ever comes, when capital may dictate to labor, or labor may dictate to capital, the rule of law which is to control in determining their respective rights as against each other. And we deem it proper to say that if the terms of this statute were reversed, and employes accorded the exclusive privilege of choosing between two laws, our decision would be the same. But before leaving this branch of the discussion we recur to the fact that the statute in question recites in its last section that it is enacted for the benefit of employes injured in industrial accidents; and yet it is so framed that no employe can obtain the benefit of it without the consent of his employer and it entirely excludes from whatever may be its benefits all employes operating railways as common carriers and all laborers engaged in working for cotton gins. These exemptions are urged as a reason against the constitutionality of the statute; but, without expressing any opinion upon that subject, we think the exemptions noted indicate either that the legislature was not endeavoring to protect the interests of all employes engaged in industrial
101 pursuits, or that that body had serious doubts as to whether the law then being enacted would accomplish the result intended.

Upon the subject we have been discussing, and the only question we have undertaken to decide, we have found no decision, either Federal or State, which is directly in point. The statute involved in Ives vs. South Buffalo Ry. Co., 201 N. Y., 271, 94 N. E. 431, was limited to certain hazardous employments; was compulsory as to both employer and employe, and, instead of abolishing, it extended the employer's liability so as to include injuries for which the employer was in no sense to blame, and for that reason it was held to be unconstitutional. It gave no option to either party, and therefore the question of discrimination in that respect was not involved.

The Massachusetts statute, which was ruled upon in Re Opinion of Justices, 96 N. E. 315, is similar in many respects to the Texas statute, with the important distinction that the employe, as well as the employer, was given his option to accept under the statute or maintain his rights at common law, and the court said: "There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employe to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, in so far as the employer is concerned, from the New York statute above referred to. By subscribing to the association, an employer voluntarily agrees to be bound by the provisions of the act. The same is

true of an employe who does not choose to stand upon his common-law rights. * * * Taking into account the non-compulsory character of the proposed act, we see nothing in any of these provisions which is not in conformity with the 14th Amendment of the Federal Constitution or which infringes upon any provision of our own constitution in regard to the taking of property without due process of law."

102 The Washington act was upheld by the Supreme Court of that state in State Ex Rel. Davis-Smith Co. vs. Clausen, 65 Wash., 156; but that act was compulsory as to both employers and employes.

The Montana act was passed upon in Cunningham vs. Northwestern Improvement Co., 119 Pac. Rep. 554, and was declared unconstitutional, because it permitted a double recovery against the employer. It did not involve the question we are dealing with in this case. And the same may be said as to laws upon the same subject enacted in Wisconsin, New Jersey, Illinois, Ohio, Minnesota and Kentucky, all of which have been sustained by the courts of last resort in those states, with the exception of the Kentucky statute, which has been declared unconstitutional by the supreme court of that state since this case was submitted in this court. That decision however, throws no particular light upon the question now under consideration. Neither of these laws gives a unilateral option to either employer or employe. They are either compulsory or optional as to both. When such statutes leave it optional with each party affected thereby, it may well be held, as has been done by some of the courts, that when both have elected to claim their benefits, they have waived whatever rights they might have had to object to their validity; and have, in effect, made the law a part of the contract between them. But when a statute is made compulsory upon both parties, while other objections may be made, neither party can raise the question we are dealing with. As heretofore stated, our decision of that question rests upon the proposition that legislation which confers upon either an employer or employe power to choose between two radically different laws, which of the two shall govern in determining their rights as against each other, is in contravention of our Federal and State Constitutions. It amounts, in substance, to an unconstitutional delegation of legislative functions.

In reaching the conclusion and making the decision we have made, it is deemed proper to say that, in as much as the Texas statute provides in terms that if any part of it shall be held
103 invalid or inoperative, no other part or parts shall be affected thereby, that we do not hold that the entire act is invalid or inoperative; but merely hold that, unless it be shown that the appellant in this case, who is an employe suing his employer, has consented to accept the terms of the Texas act relating to employers' liability, he has not lost his common-law right of action. In so far as our decision is concerned, and unless the law is unconstitutional in other respects, we see no reason why it may not stand in force and be administered for the benefit of consenting employers and employes.

Without and intention of dictating to the legislature, we deem it not amiss to say that it would seem that if legislation of this character is made optional as to both parties, many, if not all, objections to its validity would be avoided. If such legislation be made compulsory as to both parties, and is made to embrace all hazardous employments, and is limited so as not to include others that are not hazardous, it may escape the charge of going beyond the police powers of the State. It seems to be generally conceded that legislation of this character must find its source and authority in the police power of the State; and it has been said by some of the courts that legislation regulating private business must be limited to hazardous employment. A merchant or a banker who keeps more than five employes can avail himself of the benefits of the Texas statute, while neither an employer nor his employers engaged in operating a railroad as a common carrier can obtain its benefits. There is no particular danger or hazard in working for a merchant or banker, while employes who are engaged in the operation of railway *of railway* trains are constantly exposed to extra hazards. However, we do not hold that these apparently incongruous provisions are fatal to the validity of the law; nor do we hold that the objection which we have sustained cannot be cured by amendment. For a lucid discussion and illustration of the police power and its extent, we refer to the opinion of Mr. Justice Williams in Railway Co. vs.
104 Dallas, 98 Tex., 396, which was approved in the recent case of Railway Co. vs. Griffin, decided by the same court and not yet reported.

For the reasons given, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

W. M. KEY,
Chief Justice.

Filed January 23rd, 1915.

105 *Questions Certified to the Supreme Court of Texas February 3rd*, 1915.

In the Court of Civil Appeals for the Third Supreme Judicial District.

CHARLIE MIDDLETON, Appellant,

versus

TEXAS POWER & LIGHT COMPANY, Appellee.

Pending in the Court of Civil Appeals, Third District.

To the Supreme Court of Texas:

On December 23, 1913, Appellant instituted suit against appellee in the District Court of McLennan County for five thousand dollars as damages for personal injuries alleged to have been received by

him on December 6, 1913, while in appellee's employ and as the result of negligence of appellee as employer. Appellee answered, alleging that at the time of the injury plaintiff was an employe of defendant under a contract of hire; that defendant was an employer of labor in the State of Texas, and having more than five employes at the time of the accident and at the time of the answer. That it was at such times the holder of a policy of liability and compensation insurance, issued in its favor by the Ætna Life Insurance Company, and having paid a year's premium in advance, said company being one lawfully transacting a liability and compensation insurance business in the State, with a permit to do business as provided for by the Act of the Thirty-Third Legislature, Chapter 179, authorizing the organization of a Texas Employees' Insurance Association. That plaintiff was given and had notice, in writing, as required by law as soon as the policy was secured. That plaintiff was not among those excepted from the operation of said Chapter 179. That no claim for compensation had been made by plaintiff, either to the defendant or to the insurance company, but plaintiff had refused to receive the compensation provided for by said Act. That no question arising under the said Act had been referred to or was
106 determined by the Industrial Board created under the provisions of the Act. That defendant had made a report, as required by law, to the Industrial Accident Board. Defendant prayed that the action be dismissed. By supplemental petition plaintiff alleged that the law relied upon by defendant, the Texas Employers' Liability Act, was unconstitutional and void. The trial court overruled the demurrers of plaintiff to the defendant's plea in abatement and dismissed the cause of action. Plaintiff duly appealed to this court, and in the determination of this plea, it becomes necessary for this court to pass upon the constitutionality and validity of said Chapter 179, known as the "Texas Employers' Liability Act," General Laws 1913, pages 429 to 438.

(1) The first question involving the constitutionality of the Act is presented by Appellant's first and second assignments of Error which questioned the sufficiency of the title to the act, insisting that the following matters were covered by the Act, but were not included within the title—that is; provisions regulating the effect of the negligence of a fellow employe; regulating the defense of assumed risk; exempting certain classes of corporations; relative to the recovery of exemplary damages by certain persons; relative to the payment of creditors of deceased employes; relative to the waiving of rights of compensation by the employes; made provisions for keeping records of subscribers who are employers of labor; providing for the payment of dividend premiums and assessments by and to subscribers, and provisions prohibiting the institution of suits against employers by employes.

Question 1. Is the Act in whole or in part unconstitutional on account of any deficiency in the title?

(2) Question is raised (Appellant's Third Assignment) as to the unconstitutionality of the Act based on Sections 1 and 2 of Article

XII of the Constitution which provides that no private corporation shall be formed, except by general laws, the contention being that part III of the Act providing for the formation of the Texas Employers' Insurance Association creates a private corporation by a special act.

107 Question 2. Is the Act unconstitutional as in conflict with the named section?

(3) The contention is made (Fourth Assignment) that the Act is unconstitutional upon the ground that it is in conflict with Article V of the Constitution of Texas, in that it vests judicial power in a body of men, to-wit—the Industrial Accident Board, the members of which are not elected by the people.

Question 3. Is the Act unconstitutional as in conflict with the article cited?

(4) The contention is made (Appellant's Fifth Assignment of Error) that the Act is unconstitutional because "an invasion of the courts of law," in that it provides that if the parties are not willing to abide by the final ruling of the accident board, suit may be brought upon same, but the amount of the recovery is limited.

Question 4. Is the Act unconstitutional upon the ground indicated?

(5) The contention is made (Appellant's Sixth Assignment of Error) that the act in question is unconstitutional, because it provides for the "subject matter of the differences of the parties to be submitted to a Board of Arbitration, which is an exercise of duress upon the parties and which is prohibited by law and unconstitutional upon that ground."

Question 5. Is the Act unconstitutional upon the ground indicated?

(6) The contention is made (Appellant's Seventh Assignment of error) that the act is unconstitutional because judicial power is vested in the Industrial Accident Board, final in its nature and from which there is no appeal in violation of Section 1, Article V of the Constitution.

Question 6. Is the Act unconstitutional as in conflict with said section?

(7) The contention is made (Eighth Assignment) that the Act is unconstitutional as granting exclusive jurisdiction to a court of certain suits and causes of action in violation of and in conflict with Article V Sections 8, 16 and 19 of the Constitution of the State of Texas.

108 Question 7. Is the Act unconstitutional as in conflict with those sections in the particular indicated?

(8) The contention is made (Ninth Assignment) that the Act is unconstitutional because in conflict with Section 3 of Article I of the Constitution of the State of Texas and with the Fourteenth Amendment to the Constitution of the United States, guaranteeing equal protection of the laws to all citizens and prohibiting class legislation in the following particulars; in that the employer is given the right of election as to whether or not he will take out insurance and otherwise come under the terms of the Act providing for compensation to be paid to the employe in case of injury, or shall be subject

to those provisions which regulate his liability, and that the employe has no such option.

Question 8. Is the Act unconstitutional as in conflict with the named provisions of the Constitution of the State of Texas and of the United States upon the ground indicated?

(9) The contention is made (Eleventh Assignment) that the Act is in violation of the Fourteenth Amendment of the Constitution of the United States as resulting in a confiscation of the property of the individual without due process of law, in that payment of compensation is determined and compelled without reference to any negligence on the part of the employer and without any proper determination of the extent of the injury of the employee.

Question 9. Is the Act unconstitutional as taking away due process of law?

(10) The contention is made (Twelfth Assignment) that the Act is unconstitutional as interfering with the rights of individuals to contract.

Question 10. Is the Act unconstitutional upon the ground indicated?

(11) The contention is made (Thirteenth Assignment) that the Act is unconstitutional upon the ground that the right of trial by jury is taken away in contravention of Article I, Section 15, of the Constitution of Texas and Article VII of the Amendment to the Constitution of the United States.

109 Question 11. Is the Act unconstitutional as in conflict with the provisions named?

(12) The contention is made (Fourteenth Assignment) that the Act is unconstitutional because it constitutes an abrogation of the common law right of action on the part of the party injured.

Question 12. Is the Act unconstitutional on the ground indicated?

(13) The contention is made (Fifteenth Assignment) that the Act is unconstitutional because the statute does not afford adequate opportunity to the parties to show the amount of damages sustained or to show whether or not any negligence on the part of plaintiff contributed to the injury, "depriving the party thereby of his day in court."

Question 13. Is the Act unconstitutional on the ground indicated?

(14) The Act excepts from its operation employers employing not more than five employees, railroads acting as common carriers, domestic servants, farm laborers and gin hands.

Question 14. Do the exceptions indicated constitute such a classification as is permitted under the provisions of the Constitution of the State of Texas and of the United States which guarantee equal protection of the law, or is the Act unconstitutional as in conflict with those provisions on account of these exceptions?

(15) Does the Act violate Article II, Section 1 and Article III of the Constitution of Texas providing for the division of the powers of government into three distinct departments?

(16) Is the Act a proper exercise of the police power?

(17) Section 4 of Part IV of the Act provides that if any part of the Act should be held invalid or inoperative, no other part shall be

affected thereby, and that if any exception to or limitation upon any general provision should be held unconstitutional or invalid or ineffective, the general provisions shall nevertheless stand effective and valid as if it had been enacted without exception or limitation. If you hold any part of the Act unconstitutional, what effect does this Section have as to the balance of the Act?

110–112 This court (the Court of Civil Appeals) has sustained the ninth Assignment of Error and rendered a judgment reversing and remanding the case, and a copy of our opinion is hereto attached. Appellee has submitted a motion for rehearing, which is now pending, and both parties have requested us to certify the foregoing questions and the correctness of the foregoing ruling of this court to the Supreme Court for decision, which is hereby done.

Witness the Court of Civil Appeals for the Third Supreme Judicial District by W. M. Key, Chief Justice of said Court on this 3rd day of February, A. D. 1915.

[SEAL.]

W. M. KEY,
Chief Justice.

No. 5408.

CHARLES MIDDLETON, Appellant,

vs.

TEXAS POWER & LIGHT COMPANY, Appellee.

Appeal from the District Court of McLennan County.

Opinion.

Appellant brought this suit against appellee, seeking to recover $5,000.00 as damages for injuries sustained by him while in the employ of appellee, which injuries he alleged were caused by appellee's negligence. Appellee filed a plea in abatement showing that it, as an employer, had complied with the requirements of the Employers' Liability Act enacted by the 33rd Legislature, and asked that the suit be dismissed. In a supplemental petition appellant excepted to the plea referred to, charging that the Employers' Liability Act was unconstitutional and void. The trial Court overruled the exceptions, sustained the plea in abatement, and dismissed the cause of action, and the appellant has prosecuted an appeal.

If that portion of the Employers' Liability Act which prescribes that when an employer has complied with the requirements of the act his employes shall have no right of action against him for damages for personal injuries is unconstitutional and void as to non-consenting employes, then the trial court committed error

113 when it sustained the plea in abatement. The act referred to is too voluminous to be copied in full in this opinion, and we deem it sufficient to copy from appellant's printed argument the following synopsis of it:

Chapter 179 of the general laws of the State of Texas passed by

the Thirty-third Legislature at its regular session, page 429, approved April 16, 1913, effective September 1st, 1913, is divided into four parts.

"Section 1, Part 1, abolishes certain common-law defenses available to the employer in personal injury suits brought by an employe. Section 2 declares that the provisions of the act shall not apply to actions to recover damages for personal injuries sustained by certain classes of employes. Section 3 takes away any and all rights of action by employes of subscribers against their employer for damages for personal injuries, and provides that they shall look for compensation solely to certain insurance associations or companies, which, by subsequent terms of the law, the employer is allowed to contract with for the benefit of such employes. Section 4 excludes employes from participating in the benefits of the insurance organization, if their employers are not subscribers, and also declares their constitutional and common law right to bring suits against their employers. Section 5 relates solely to the recovery of exemplary damages. Sections 6 to 13 relate to the scale of compensation to be paid to the injured employe. For the purposes under consideration, it is sufficient to note that section 6 provides that no compensation shall be paid for an injury which does not incapacitate the employe for a period of at least one week from earning full wages; that section 7 makes provision for furnishing, during the first week, of reasonable medical aid, hospital services and medicines; that section 10 fixes a maximum and minimum amount to be paid weekly to an injured employe during a maximum period of time, while incapacity for work is total; section 11 has the same character of restriction, while the capacity for work is partial; that section 12 provides for certain compensation for certain specific injuries. By Section 14 it is provided that no agreement of any employe to waive his rights to compensa-
114 tion under this act shall be valid.

"Part 2 of the act creates an Industrial Accident Board, with state-wide jurisdiction of the subject matter presented in the act. For the purposes under consideration it is sufficient to note, by section 4 of Part 2, it is provided that the Board may require any employe claiming to have sustained injury, to submit himself to a physical examination; and that a refusal so to do shall deprive him of the right to compensation during the continuance of such refusal; that section 5 provides that, in the event an interested party is not willing to abide the final ruling and decision of the Board on any disputed claim, he may sue on such claim, or may require suit to be brought thereon in some court of competent jurisdiction; and that, in such suit, the rights and liabilities of the parties thereto shall be determined by the provisions of this act; that such suit shall be against the association and the recovery shall not exceed the maximum of compensation allowed under the provisions of this act.

"By Part 3, the 'Texas Employers' Insurance Association' is created a body corporate, with powers provided for in subsequent sections of the act. Sections 19 and 20 of the act provide that subscribers shall give notice in writing or print to all persons under contract of hire with him, and to all persons about to enter into a con-

tract of hire with him, that he has provided for payment of compensation for injuries to employes by the association.

"Part 4 defines the terms used generally in the act. Among other terms thus defined is 'Association,' which is declared to mean: 'The Texas Employers' Insurance Association,' or any other insurance company authorized under this act to insure the payment of compensation to injured employes, or to the beneficiaries of deceased employes. 'Subscriber' is also defined to mean, 'Any employer who has become a member of the association by paying a year's premium in advance and received the receipt of the association therefor.' Section 2 of Part 4 grants insurance companies, other than the Texas
115 Employers' Association the right to insure the liability to pay the compensation provided for by the act, and imposes certain duties upon such companies. Section 4, Part 4, provides that, should any 'part' of this act be, for any reason held to be invalid or inoperative, no other part or parts shall be affected thereby, and if any exceptions to, or limitations upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective, the general provisions shall, nevertheless, stand effective and valid as if it has been enacted without exception or limitation."

The counsel who represent appellant have filed well prepared printed brief and argument, presenting quite a number of constitutional objections to the validity of the statute in question. Counsel for appellee, in printed brief and argument, manifesting equally as much ability and research, have undertaken to answer all the objections referred to; and, in addition to this valuable assistances, the respective counsel made able oral arguments when the case was submitted.

This court has attempted to give the case that careful consideration which its importance demands, and the writer of this opinion has read every American decision construing employers' liability or workmen's compensation acts cited by counsel or otherwise found. In some of the states, if not in all, there seems to be great necessity and demand for legislation upon the subject referred to; and, while this court is not required to commit itself upon any question of legislative policy, still, we feel that it is not improper to say that the evils sought to be cured by such legislation are widespread and of such a nature as to justify the best efforts of statesmanship, in order that a law may be enacted which will afford substantial remedy without exceeding constitutional limitations.

Several of the states have already dealt with the question, and some of the provisions of their statutes, and the decisions construing them, may hereafter be referred to.

We have reached the conclusion that so much of the statute here involved as undertakes to deprive an employe of what otherwise would be his cause of action against his employer, is uncon-
116 stitutional and void; but as the jurisdiction of this court is not final, and as the case will go to the Supreme Court, we shall not undertake to decide other constitutional questions. Our reason for holding that the provision of the statutes referred to is unconstitutional is based upon the fact that it leaves it optional as to the

employer, and makes it compulsory as to the employe when the employer has elected to avail himself of the benefits of the statute. The federal constitution declares that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and our state constitution, in section 3, article 1, in general terms, declares the equal rights of men. Section 19, art. 1 reads: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land." The constitution also vests in the Legislature the exclusive power to make laws, and therefore that body has no power to delegate legislative authority to any private person. Undoubtedly, the statute here involved is optional as to the employer,—he has his choice and may or may not become a subscriber, pay premiums, obtain insurance for the benefit of his employees, and thereby release himself from what would otherwise be his liability to such employes. It is true that if he does not pursue that course he loses some of his common-law defenses; but the fact remains that he has an option and may choose between two laws concerning himself and his employes and fixing their respective rights.

We think it is also quite clear that the statute is compulsory as to the employe and allows him no choice as to whether he will accept its terms, or claim his rights as they formerly existed according to the common-law. This being the case, we think it is clear that this statute, in so far as it undertakes, without his consent, to deprive an employe of his common-law right of action at the option of his employer, is violative of the constitutional provisions above re-
117 ferred to. True it is, in theory, if not in fact, that every man has the privilege of declining to accept employment from any particular person or corporation; but if he pursues that course and remains out of the employment of any employer who has accepted the terms and provisions of this statute, then he has not exercised any option as an employe. He has merely declined to become an employe. In several of the states which have legislated upon the subject it has been left optional with both employer and employe, and if the employer chooses to accept the terms of the law, his employe, without giving up his employment, may decline to accept under the statute and retain his common-law right of action against his employer. In some of the other states the law is compulsory as to both employer and employe. The Texas statute declares, in express terms, that when an employer has complied with its provisions, neither the employe nor his legal representatives shall have any right of action against him for injuries to such employe; and it makes no provision whereby the employe can exercise his option and either accept or reject that provision of the statute. In other words, the statute presents to the employer two laws, differing widely and radically concerning his liability to his employe, and permits him to choose, without the consent of his employe, which of those two laws shall fix the rights of his employe as against him. If he selects one of those laws, his employe can maintain an action against him and recover damages for personal injuries caused by his negligence, according to the com-

mon-law as it existed before this statute was enacted; while if he selects the other law, by which a limited amount of compensation is to be paid to the injured employe by an insurance company, he, the employer, is relieved from liability, and an employe injured by his negligence can maintain no cause of action against him. It is true that if he pursues the latter course he is required to pay the premiums for insurance for the protection of his employes, but he is not required to make any change whatever in the conditions under which the employe works. The hazards to the employe may remain
118 the same, while the employer, without the consent of the employe, has the option to substitute for his common-law liability insurance in behalf of the employe for a limited amount of compensation for injuries which he may sustain in the course of his employment. Has the legislature the power to enact a law that embodies such a fundamental and far-reaching discrimination in favor of the employer and against the employe. After careful and patient consideration we think it is clear that this question must be answered in the negative, and that feature of the statute be declared unconstitutional.

In Yick Wo vs. Peter Hopkins, 118 U. S. 220, 30 L. Ed. 356, the Supreme Court of the United States held that an ordinance of the city of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed of brick or stone, was in contravention of the 14th Amendment to the constitution of the United States, and void, and in the course of the opinion, the court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself, is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of
119 the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For the very idea that one

man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the escence of slavery itself."

In that case it was held that it was not in the power of the state or any of its subordinate municipalities to confer upon a board (presumably of disinterested persons) the arbitrary power to determine whether or not a particular statutory enactment should apply to a particular person; and, for a higher and greater reason, it seems to us, that it must be held that it is beyond the domain of legislative power to confer upon any person authority to say what particular law, or which of two particular laws, shall govern his rights and the rights of his employe as between them. We are not unmindful of the rule, supported by all the authorities, that legislation may be based upon reasonable classification; and when so done, and no discrimination is made among different members of a class, such legislation is not obnoxious to federal and state constitutions. But the rule and decisions referred to do not go to the extent of holding that, without doing anything to lessen the risk and hazards of the employment, an employer, without the consent of his employe, may, at his own option, substitute the liability of another for his own liability to the employe, and thereby release himself from all liability. Therefore it is no answer to say that the Texas statute affords equal rights, privileges and protection to the employers as one class, and the employes, as another class, who come within the purview of its provisions. This statute is an illustration of the fact that legislation may be so discriminatory and unjust as between classes as to bring it in conflict with those constitutional provisions which guarantee due process and equal protection of the laws. Nor does it suffice to say that the statute in question shows upon its face that it was enacted for the benefit of employes, and therefore the courts, in determining its validity, should assume that the employe who has an opportunity to avail himself of its benefits, has been benefitted and not injured, and consequently ought not to be heard to complain. Considering the schedules prescribed by this statute, the maximum amount per week that can be claimed by an injured employe, and the limited number of weeks compensation is allowed, and the fact that since the statute became effective on September 1st, 1913, about three thousand employers have availed themselves of its benefits, we are not prepared to say that no room exists for difference of opinion as to whether the statute will result in material benefit to employes considered in the aggregate; and it is quite clear, when considered in the concrete, and applied to this case, if the facts are as alleged in plaintiff's petition, he might reasonably and fairly obtain more compensation under the rules of the common-law than he could obtain under this statute. But these considerations do not constitute a proper test of the validity of legislation conferring an option on the employer to decide which of two different rules of law shall govern as between himself and his employe. The validity or invalidity of such legislation does not rest upon what would be the

result in a particular case. The insuperable objection is that it is not only contrary to the plainest dictates of right and justice that where the interest of persons may conflict, neither one should have the power to determine what rule of law should govern, but, under our form of government, any legislation which undertakes to confer upon any individual or class of individuals such a privilege, violates constitutional provisions, both state and national. Such legislation cannot justify itself in the forum of conscience, because it contravenes that rule of justice which forbids any man to
121 act as Judge or *or* juror in his own case. It is immaterial that a particular man, in such circumstances, might disregard his own interest and decide the matter fairly. We do not make nor administer our laws upon the Utopian theory that any man will do absolute justice by his fellow-man, although he may have a strong motive for acting otherwise. On the contrary, we make and endeavor to administer laws upon the theory that when men deal with each other they may not do that which justice and fair-dealing dictates should be done. So, we know, as matter of common knowledge, that while, in a certain sense, the interest of capital and labor may be identical, still, when capital deals with labor in the concrete, if either has an opportunity to do so, it may drive a hard bargain and impose unjust hardships upon the other. It will be a sad day, if it ever comes, when capital may dictate to labor, or labor may dictate to capital the rule of law which is to control in determining their respective rights as against each other. And we deem it proper to say that if the terms of this statute were reversed, and employes accorded the exclusive privilege of choosing between two laws, our decision would be the same. But before leaving this branch of the discussion we recur to the fact that the statute in question in its last section recites that it is enacted for the benefit of employes injured in industrial accidents; and yet it is so framed that no employe can obtain the benefit of it without the consent of his employer and it entirely excludes from whatever may be its benefits all employes operating railways as sommon carriers and all laborers engaged in working for cotton gins. These exemptions are urged as a reason against the constitutionality of the statute; but, without expressing any opinion upon that subject, we think the exemptions noted indicate either that the Legislature was not endeavoring to protect the interests of all employes engaged in industrial pursuits, or that that body had serious doubts as to whether the law then being enacted would accomplish the result intended.

Upon the subject we have been discussing, and the only question we have undertaken to decide, we have found no decision,
122 either federal or state, which is directly in point. The statute involved in Ives vs. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431, was limited to certain hazardous employments; was compulsory as to both employer and employe, and instead of abolishing, it extended the employer's liability so as to include injuries for which the employer was in no sense to blame, and for that reason it was held to be unconstitutional. It gave no option to either

party, and therefore the question of discrimination in that respect was not involved.

The Massachusetts statute, which was ruled upon in re Opinion of Justices, 96 N. E. 315, is similar in many respects to the Texas statute, with the important distinction that the employe, as well as the employer, was given his option to accept under the statute or maintain his rights at common-law, and the court said: "There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employe to waive his rights of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, in so far as the employer is concerned, from the New York statute above referred to. By subscribing to the association, an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employe who does not choose to stand upon his common-law rights. * * * Taking into account the non-compulsory character of the proposed act, we see nothing in any of these provisions which is not in conformity with the 14th Amendment of the federal constitution, or which infringes upon any provision of our own constitution, in regard to the taking of property without due process of law."

The Washington act was upheld by the supreme court of that state in State Ex Rel. Davis-Smith Co. vs. Clausen, 65 Wash. 156; but that act was compulsory as to both employers and employes.

The Montana act was passed upon in Cunningham vs. Northwestern Improvement Company, 119 Pac. Rep., 554, and was declared unconstitutional, because it permitted a double re-
123 covery against the employer. It did not involve the question we are dealing with in this case. And the same may be said as to laws upon the same subject enacted in Wisconsin, New Jersey, Illinois, Ohio, Minnesota and Kentucky, all of which have been sustained by the courts of last resort in those states, with the exception of Kentucky statute, which has been declared unconstitutional by the supreme court of that state since this case was submitted in this court. That decision, however, throws no particular light upon the question now under consideration. Neither of these laws gives a unilateral option to either employer or employe. They are either compulsory or optional as to both. When such statutes leave it optional with each party affected thereby, it may well be held, as has been done by some of the courts, that when both have elected to claim their benefits, they have waived whatever rights they might have had to object to their validity; and have, in effect, made the law a part of the contract between them. But when a statute is made compulsory upon both parties, while other objections may be made, neither party can raise the question we are dealing with. As heretofore stated, our decision of that question rests upon the proposition that legislation which confers upon either an employer or employe power to choose between two radically different laws, which of the two shall govern in determining their rights as against each other, is in contravention of our federal and state constitution-. It amounts, in substance, to an unconstitutional delegation of legislative functions.

In reaching the conclusion and making the decision we have made, it is deemed proper to say that, inasmuch as the Texas statute provides, in terms, that if any part of it shall be held invalid or inoperative, no other part or parts shall be affected thereby, that we do not hold that the entire act is invalid or inoperative; but merely hold that, unless it be shown that the appellant in this case, who is an employe suing his employer, has consented to accept the terms of the Texas act relating to employers' liability, he has not lost his common-law right of action. In so far as our decision is concerned, and unless the law is unconstitutional in other re-
124 spects, we see no reason why it may not stand in force and be administered for the benefit of consenting employers and employes.

Without any intention of dictating to the Legislature, we deem it not amiss to say that it would seem that if legislation of this character is made optional as to both parties, many, if not all, objections to its validity would be avoided. If such legislation be made compulsory as to both parties, and is made to embrace all hazardous employments, and *it* limited so as not to include others that are not hazardous, it may escape the charge of going beyond the police powers of the state. It seems to be generally conceded that legislation of this character must find its source and authority in the police power of the state; and it has been said by some of the courts that legislation regulating private business must be limited to hazardous employment. A merchant or a banker who keeps more than five employes can avail himself of the benefits of the Texas statute, while neither an employer nor his employes engaged in operating a railroad as a common carrier can obtain its benefits. There is no particular danger or hazard in working for a merchant or banker, while employes who are engaged in the operation of railway trains are constantly exposed to extra hazards. However, we do not hold that these apparently incongruous provisions are fatal to the validity of the law; nor do we hold that the objection which we have sustained cannot be cured by amendment. For a lucid discussion and illustration of the police power and its extent, we refer to the opinion of Mr. Justice Williams in Railway Co. vs. Dallas, 98 Tex., 396, which was approved in the recent case of Railway Co. vs. Griffin, decided by the same court and not yet reported.

For the reason given, the judgment of the court below is reversed and the cause remanded.

Reversed and Remanded.

W. M. KEY,
Chief Justice.

Filed Jan. 23, 1915.

125 Endorsed: No. 2744. No. 5408. Charlie Middleton, Appellant, vs. Texas Power & Light Co., Appellee. Certified Questions. O. K. Nelson Phillips. Filed in Supreme Court Febr'y 3, 1915. F. T. Connerly, Clerk, by H. L. Clamp, Deputy. Submitted orally by Mr. Starling for appellant, and Mr. Lawther for Appellee.

Opinion and Order of the Supreme Court on Certified Questions.

No. 2744.

CHARLIE MIDDLETON, Appellant,

vs.

TEXAS POWER & LIGHT COMPANY, Appellee.

(From McLennan County, Third District.)

In this case we are called upon to answer seventeen questions certified by the honorable Court of Civil Appeals for the Third District as to the constitutionality of the Act of the Thirty-third Legislature relating to the liability of employers and compensation of workmen for personal injuries. Apparently every possible constitutional question suggested by the Act has been embraced in the certificate, including some which the appellant was in no position to raise.

The Act contains many provisions and is therefore of considerable length. Instead of setting out its different sections, its evident purpose, operation and effect, will be stated to such extent as is necessary.

Its general purpose is to work an important change in the law in regard to the liability of employers for personal injuries to their employees, or for death resulting from such injuries, and the compensation afforded therefor to employees or their beneficiaries. It creates an employers' insurance association to which any employer of labor in the state, with certain exceptions, may become a subscriber. Out of the funds of this association, derived from the premiums upon policies of liability insurance by it issued to subscribing members and assessments authorized against them,
126 if necessary, the compensation provided by the Act as due on account of personal injuries sustained by their employees, or on account of death resulting from personal injury, is to be paid. This compensation, fixed by the Act on the basis of the employee's average weekly wages, accrues to him absolutely upon his suffering any personal injury in the course of his employment which incapacitates him from earning full wages for as long a period as one week, or to his representatives or beneficiaries in the event of his death from the injury, whether or not due to the negligence of the employer or any of his servants or agents; and is protected from all process or claims to the same extent as current wages under existing laws. It is the substitute intended and provided by the Act for damages ordinarily recoverable at common law or by statute on account of injuries suffered by an employee or because of his death, when due to the negligence of the employer or his servants; it being declared by the Act that the employee of a subscribing employer shall have no cause of action against him for damages for personal injuries, nor shall his representatives or beneficiaries

in case of his death, except that exemplary damages may be recovered in an ordinary suit by the surviving husband, wife and heirs of any deceased employee whose death is caused by homicide through the wilful act or omission or gross negligence of his employer.

While any employer of labor within the state, with the exceptions provided, may become a subscriber and by complying with the Act, be, except as to exemplary damages just noted, exempt from all common law or statutory liability on account of injuries suffered in his service by his employees, by the Act all employers who do not become subscribers, in a suit for damages on account of such injuries, or for death resulting therefrom, are deprived of the common law defences of the negligence of a fellow servant and assumed risk, and, as an absolute defense, of contributory negligence on the part of the employee, as well; it being provided that the damages in such suits shall be diminished in proportion to the amount of negligence attributable to the employee, and that no employee shall be deemed guilty of contributory negligence where the violation by the employer of any statute enacted for the
127 safety of employees contributed to his injury or death. It is declared, however, that in all such actions against a non-subscribing employer, it shall be proved, as necessary to a recovery, that the injury to or death of the employee was due to the negligence of the employer, or some agent or servant acting for him within the general scope of his employment; and that where the injury was caused by the wilful intention of the employee to bring it about, the employer may defend upon that ground.

Wholly excepted from the operation of the Act are employers,—and their employees as well,—operating railways as common carriers, cotton gins, and those engaged in any class of business having in their employ not more than five employees. The Act likewise does not apply to employees who are domestic servants or farm laborers.

Every employer becoming a subscriber to the insurance association is required to give written or printed notice to all employees under contract of employment with him that he has provided for payment by the association of compensation for injuries received by them in the course of their employment.

Under certain conditions an employer holding a policy insuring against his liability, issued by any insurance company lawfully transacting a liability or accident insurance business within the state, shall be deemed a subscriber within the meaning of the Act.

There is also created by the Act and charged with its administration, a board of three members whose duties are defined. In general, its province is the determination of disputed claims arising under the Act. If its decision is not accepted, suit may be brought upon the claim, or be required to be brought, against the association if the employer of the injured or deceased employee was a subscriber at the time of his injury, or death, in a court of competent jurisdiction, which, however, shall adjudicate the questions

of liability and compensation according to the provisions of the Act.

In brief, the operation of the Act, as to all employers of labor within the state not excepted by its terms, is this:

1. They may, at their election, become subscribers under the Act, or what may be termed consenting members to its gen-
128 eral scheme of liability and compensation, or remain without its pale.

2. If they become subscribers and give the required notice to that effect to their employees, they are exempt from all common law or other statutory liability for personal injury suffered by such employees in their service, except that for exemplary damages where an employee is killed through an employer's wilful act or omission or gross negligence, which may be defended against as under existing law.

3. If they do not become subscribers, they are amenable to suits for damages recoverable at common law or by statute on account of personal injuries suffered by their employees in the course of their employment, and are denied the right of making what constitute the common law defenses thereto. In such suit, however, no recovery may be had against an employer except upon proof of his negligence, or negligence on the part of some agent or servant acting within the general scope of his employment; or where the employee wilfully caused his own injury.

As to employees, this is the effect of the Act:

1. They are at liberty to work or not to work for employers who are, or who may become, subscribers under the Act.

2. If they enter the service of a subscribing employer, or remain in his service after written or printed notice given by him that he is such an employer, and are injured in the course of their employment, a stated compensation, based upon their average wages, is paid them therefor, or to their representatives or beneficiaries in the event of death from the injury, without regard to whether the employer is liable therefor as at common law and therefore without the necessity of proving negligence, through an agency provided by the Act as the means of insuring such payment.

3. Such employees as are injured in the service of subscribing employers who comply with the Act, are denied all right of action therefor against such employers, as are the representatives and beneficiaries of deceased employees for injuries resulting in death, except that the surviving husband, wife and heirs of any such deceased employee killed through the wilful act or omission or gross negligence of such employer may maintain an action for exemplary damages on account of his death.

129 This being the operation of the Act upon employers and employees, the question that commands first attention in the consideration of its constitutionality is, Does it violate any of their fundamental rights? This will be determined in the light of the several questions certified, without setting them out or attempting to answer them separately. As to employers, it is clear that no fundamental right is invaded. The Act leaves them free to adopt

its plan of compensation, or remain ungoverned by it. The consequence attached to their not consenting to it, is the denial of the rights, existing in common law actions, to interpose the common law defenses of fellow servant, assumed risk, and contributory negligence in suits for the recovery of damages for personal injuries suffered by their employees in the course of their employment. But that is not a vested right or a right of property. Those defenses are but doctrines or rules of the common law. Rights of property which have been created by the common law cannot be taken away by the Legislature. They are protected from destruction by any process except the due process of the law, that is, law in its regular course of administration through courts of justice. But no one has a vested interest in the rules, themselves, of the common law; and it is within the power of the Legislature to change them or entirely repeal them. Munn vs. Illinois, 94 U. S. 113; Second Employers' Liability Cases, 223 U. S. 1.

A legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages. But it is wholly without any power to deny the citizens the right of making any defense when sued in the courts. There is no such thing in this country as taking one man's property without his consent and giving it to another by legislative edict. That is nothing less than confiscation by legislative decree. If this Act, therefore, had declared an employer not consenting to its provisions absolutely liable in damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void. Such a law would have amounted to a legislative forfeiture of property rights, regardless of the holding of any court upon the question. The act in its effect would have been the same if it had sought to
130 deprive the employer of all defenses to such a suit. The true rule is that while technical defenses may be abrogated by statute, those which affect a party's substantial equities may not be. Cooley Const. Lim. 456; Maguiar vs. Henry, 84 Ky. 1; First School District vs. Ufford, 52 Conn. 44. The defenses formerly available to an employer and abrogated by the Act are not of the latter character. Their operation in the common law action for damages is not to acquit the employer because of his having breached no duty and being without fault, but they deny recovery to the employee because of his conduct, or, under the fellow servant doctrine, because the act is that of a co-employee, and the consequances imputed to the employee for that reason as a rule of law. It was within the power of the Legislature to change the rule.

Employers who become subscribers under the Act voluntarily waive the right to have their liability determined in the courts. As to employers who remain without the Act, negligence on their part or of some servant or agent acting in the scope of his employment must be established to render them liable in a suit for injuries suffered by the employee. This is not the creation of an absolute liability against them. They may still defend and defeat the suit by

disproving any negligence. The substantial defense to such actions is therefore not taken away. The Act, accordingly, deprives neither class of employers of any fundamental right. The State vs. Cramer, 85 Ohio St. 349; Opinion of Justices, 209 Mass. 607; Borgnis vs. Falk Company, 147 Wis. 327; Jeffrey Manufacturing Company vs. Blagg, 235 U. S. 571.

The effect of the Act upon the rights of employees cannot be properly weighed or determined without a due consideration of its aim and policy in their interest. Its theory, as it concerns them, is that the plan of compensation it provides for their injuries suffered in the course of their employment is more advantageous than a suit for damages. In the latter, the employee is compelled to assume the burden of establishing that his injury was caused by the employer's negligence or the negligence of a servant for which the employer is responsible. His suit fails if it is subject to any of the common law defenses, that is, if his own negligence was the proximate cause of the injury, or if the injury was due to a risk he assumed, or the negligence of a fellow servant. By the Act a
131 fixed compensation is payable to him upon the mere happening of any injury in the course of the employment, or to his beneficiaries in the event of his death from the injury, without reference to any negligence on the part of the employer or his servants and without regard to defenses available to the employer at common law.

With this as the evident spirit and design of the Act in the employee's interest, his entering the service of an employer who in his business pursuit is governed by the Act, or his remaining, after notice duly given, in the service of an employer who has adopted its plan of compensation and become subject to it, is made to operate as a waiver of any cause of action against the employer on account of any injury suffered in the course of the employment, except for exemplary damages in behalf of a surviving husband, wife, or heirs, as already noted.

Does this deprive the employee of any vested right or property right? It is clear that it takes from him no property right. A vested right of action given by the principles of the common law is a property right, and is protected by the Constitution as is other property. The Act, however, does not profess to deal with rights of action accruing before its passage. That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury. This is nothing more or less than a denial to him by the Legislature of certain rules of the common law for the future determination of the employer's liability to him for personal injuries incurred in the latter's service, and, in the plan of compensation provided, the substitution by the Legislature of another law governing such liability and providing a different remedy. The question is: Was the Legislature without the power to thus completely change the law upon the subject? This inquiry has no concern in the wisdom of the change; it takes no account of the reason for it; it is limited to the naked question of the Legislature's power.

That the Legislature possessed the power, must be conceded, unless it be true that the employee is protected by the Constitution in the continuance of the rules of the common law for his benefit
132 in the determination of the employer's liability for such injuries as those with which the Act deals. That no one has a vested right in the continuance of present laws in relation to a particular subject, is a fundamental proposition; it is not open to challenge. The laws may be changed by the Legislature so long as they do not destroy or prevent an adequate enforcement of vested rights. There cannot be a vested right, or a property right, in a mere rule of law.

Here the character of injuries, or wrongs, dealt with by the Act becomes important. Notwithstanding the breadth of some of its terms, its evident purpose was to confine its operation to only accidental injuries, and its scope is to be so limited. Its emergency clause declares its aim to be the protection by an adequate law of the rights of employees injured in "industrial accidents," and the beneficiaries of such employees as may be killed "in such accidents." The Bill of Rights, Section 13, Article I of the Constitution provides that "every person for any injury done him, in his lands, goods, person or reputation, shall have his remedy by due course of law"; that is, the right of redress in the courts of the land in accordance with the law's administration. It is therefore not to be doubted that the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed. This Act does not affect the right of redress for that class of wrongs. The injuries, or wrongs, with which it deals are accidental injuries or wrongs. What we know and denominate as the cause of action arising from an accidental injury is purely the creation of the common law. It is a common law liability founded upon the common law doctrine of negligence; and but for the rule of the common law,—sometimes also expressed in statutes—there would be no liability for such an injury, and hence no cause of action for it.

133 Therefore in denying the employee of a subscribing employer, or his beneficiaries, any cause of action for accidental injuries, this Act simply changes the common law rule of liability upon the subject. It in effect declares that such employers shall no longer be liable as under that rule, but shall be liable according to the rule prescribed by the Act. If the Legislature in the performance of its function of declaring what the law shall be, is authorized to change and repeal the rules of the common law upon other subjects, as is undoubted and has been done in numerous and notable instances, wherein is its power to change this common law rule to be denied? If it may entirely abrogate the common law rule of contributory negligence, thus relieving the employee of all consequence of his negligence, and transferring it, in effect, to the employer, what is there, as a matter of purely legislative authority, to prevent its relieving the employer of the consequence of his negli-

gence and, in particular, the negligence of his servants, and determining that he shall compensate his employee for accidental injuries received in his service according to a different rule, through another remedy, and in its judgment by a better plan? If, in a word, it may declare that contributory negligence shall no longer be a defense, may it not also declare, as to purely accidental injuries, that negligence shall no longer be actionable? If it may change defensive common law rules, may it not also change a common law rule of liability? The power of the Legislature cannot exist in the one instance and not in the other. In virtue of its authority to enact laws, and, in doing so, to supersede common law rules where it deems such action wise, it exists in both; and it was in our opinion therefore competent for the Legislature, by this Act, to change both the common law rule of defenses and the common law rule of liability with respect to accidental injuries sustained by an employee in the course of his employment requiring the employer, if he elects to come under the Act, to provide, according to its plan, a fixed compensation to be paid the employee, or his beneficiaries if his injury results in death, and denying to the employee of an employer subject to the Act, or his beneficiaries, the right of recovery therefor according to common law rules. We rest the de-
134 cision of this question upon what seems to us is the evident proposition that no one has any vested — or property interest in the rules of the common law, and therefore no one is deprived of a constitutional right by their change through legislative enactment. Jenson vs. Railway Company, 215 N. Y. 514; 109 N. E. 600. The alteration in the law worked by this Act may be marked, but that does not of itself affect the power of the Legislature to so write the law; and it is only with the question of its power that we are concerned. The bearing of the Act upon the rights of employees, in its denial to those engaged in the service of a subscribing employer of a common law action for injuries so suffered, presents the vital constitutional question of the legislation. It is its abrogation of a familiar rule of liability that affords the chief challenge of its validity and not unnaturally prompts the test of the Constitution. But that instrument has not undertaken to preserve inviolate the rules of the common law. That system of rules to the extent that we are governed by it was adopted by the Legislature, and the same authority may alter it. The right to have the liability of an employer for an accidental injury to an employee determined by a common law doctrine is not a constitutional immunity, and this Act in changing that rule of liability therefore invades no constitutional rights.

We do not regard the Act in other respects as violative of any of the other constitutional provisions referred to in the certificate. The Act contains but one general subject; its purpose is one general object; and its title sufficiently expresses it. It vests no judicial power in the Industrial Accident Board which it creates. That board is but an administrative agency provided for the proper execution of the Act. The classification adopted by the Act is not to be held by a court as an arbitrary and unreasonable one. In the enactment of

such a law the legislature was privileged to make a classification in respect to employees subject to the law. Classificatior for the purpose of a law is a legislative function. It will be sustained by the courts unless it is wholly without any reasonable basis. Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the Act, but this was doubtless for reasons
135 that the legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to the hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the Act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary.

Nor does the Act impair the right of trial by jury. Trial by jury cannot be claimed in an inquiry that is non-judicial in its character, or with respect to proceedings before an administrative board. The accident Board charged with the administration of the Act is, as we have said, not a court. In its determination of disputed claims there could be no right to a jury trial. The Act authorizes appeals from the decisions of the Board to the courts, where a jury trial of the matters in dispute, under the law as embodied in the Act, may be had.

The insurance association created by the Act is not a private corporation, and this part of the Act is not violative of the Constitution in its provision that no private corporation shall be formed except by general laws. Some such agency as the insurance association may be deemed as essential to the efficient execution of the Act. It was a way of giving effect to the plan as a dependable method of providing the funds necessary for the payment to employees of the compensation the Act is designed to afford. The association is very clearly only an agency for the proper administration of this law. It has no functions or powers which it may exercise for any other purpose. It is denominated in the Act as a corporation, but that may be regarded as a term of convenience. Calling it a corporation does not make it a private corporation. Its character is to be determined by what it is, and not by its name. Railway vs. Board of Directors, 145 S. W. 892; Beach vs. Leahy, 11 Kan. 23.

The act, in our opinion, is in its several provisions a constitutional law. The respective certified questions are so answered.

136 NELSON PHILLIPS,
Chief Justice.

Opinion delivered April 26, 1916.

(Associate Justice Yantis was disqualified in this case and took no part in the decision.)

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing sixteen pages contain a true and correct copy of the opinion of thi*d* Court in Cause No. 2744, Charlie Middleton vs. Texas Power & Light Company—Certified questions from the Third District.

Witness my hand and seal of said Court this the 13th day of May, A. D. 1916.

[SEAL.] F. T. CONNERLY, *Clerk*,
By H. L. CLAMP, *Deputy*.

No. 2744.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

Certified Questions from Third District.

Opinion delivered by Chief Justice Phillips.

"It is ordered by the Court that a copy of the opinion herein delivered be certified to the Court of Civil Appeals for the Third Supreme Judicial District, and that said cause be therein proceeded with in accordance with said opinion."

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the Order made by the Supreme Court in the above styled and numbered cause.

Witness my hand and the seal of said court this the 13th day of May A. D. 1916.

[SEAL.] F. T. CONNERLY, *Clerk*,
By H. L. CLAMP, *Deputy*.

Endorsed: No. 2744. Charlie Middleton vs. Texas Power & Light Co. Certified copy of opinion and order of the Supreme Court. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Tex., May 16, 1916. R. H. Connerly, Clerk.

137 *Certified Copy Bill of Costs in Supreme Court.*

Clerk's Office, Supreme Court.

No. 2744.

CHARLIE MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

McLennan Co.

Costs of Application No. —	$3.90	
Issuing Writ of Error	1.00	
Issuing Citation and Certified Copy	2.00	
Filing Record		.50
Docketing Cause		.50
Entertaining Appearances		1.00
Filing Briefs and Arguments		3.90
Filing 11 extra papers		3.30
Filing and Entering Motion		.55
Entering Judgment		1.00
Taxing Costs		.50
Certified Copy of Bill of Costs		1.00
Issuing Mandate		1.50
Recording Opinion		9.60
Certified Copy of Opinion with Mandate		9.60
Costs in Ct. of Civil Appeals Dist		....
Costs in Ct. of Civil Appeals Dist		....
Execution for Costs	$1.00	
Recording Return on Execution	1.00	
Alias Execution and return		....
Entering Orders		1.00
Certified Copy of Motion		....
Issuing Precept		....
Sheriff's Fees		....
Counsel Notified		2.00
Total		$35.95

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original Bill of Costs is true and correct.

Witness my hand and the seal of said Court, at Austin, this the 13th day of May, 1916.

[SEAL.] F. T. CONNERLY, *Clerk.*

Endorsed: No. 2744. Certified copy of Bill of Costs in Supreme Court, Austin. Charlie Middleton vs. Texas Power & Light Co.

$35.95. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, May 16th, 1916. R. H. Connerly, Clerk.

138 *Judgment of Court of Civil Appeals on Rehearing.*

Rendered May 31st 1916.

Motion. 4414.

CHARLES MIDDLETON, Appellant,

vs.

TEXAS POWER & LIGHT COMPANY.

Appeal from District Court of McLennan County.

Opinion by Chief Justice Key.

This day came on to be heard the appellee's motion for a rehearing and same being duly considered, because it is the opinion of the court that the motion ought to be sustained; It is therefore, considered, adjudged and ordered that the motion be granted, that the former judgment of this court rendered on the 20th day of January, 1915, be set aside and vacated and that the judgment of the Court below be in all things affirmed; that the appellant, Charley Middleton, principal and his sureties, J. M. Penland and Jno. H. Carothers, pay all costs in this behalf expended and this decision be certified below for observance.

No. 5408.

CHARLES MIDDLETON, Appellant,

vs.

TEXAS POWER & LIGHT COMPANY, Appellee.

Appeal from the District Court of McLennan County.

Opinion on Motion for Rehearing.

This case involves the constitutionality of the Employers' Liability Act, passed by the 33rd Legislature. This court held that the act referred to was unconstitutional and not binding upon an employe who had not accepted its terms and agreed to be bound by it. Middleton vs. Texas Power & Light Co. 178 S. W., 956. This court held that the effect of the act referred to is to confer the power upon employers to select which of two materially different laws shall govern in determining the rights of their employes as against them, regardless of the wishes of such employes; and therefore we held that it violated both Federal and State constitutional guarantees.

139 Appellee filed a motion for rehearing and a motion to

certify the question decided by this court, and other questions, to the Supreme Court, which latter motion was granted and the motion for rehearing has been held in abeyance to await the decision of that court. The Supreme Court has decided all the questions certified, and has held that the statute referred to is valid, and free from constitutional objection (Middleton vs. Texas Power & Light Co., 185 S. W., 556). The decision of that court is the law of the case, and therefore the motion for rehearing is granted, the former judgment of this court is set aside, and the judgment of the district court is affirmed.

Motion granted. Judgment affirmed.

W. M. KEY,
Chief Justice.

Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, June 6th, 1916. R. H. Connerly, Clerk.

(*Petition to the Supreme Court of the United States for a Writ of Error.*)

In the Supreme Court of the United States.

No. —.

CHARLIE MIDDLETON, Plaintiff in Error,

v.

TEXAS POWER & LIGHT COMPANY, Defendant in Error.

Petition for a Writ of Error.

To the Honorable Supreme Court of the United States:

Now by his attorney comes Charlie Middleton of McLennan County, Texas, original plaintiff in the above entitled and numbered cause, and prays for the allowance of a writ of error, and respectfully shows:

That petitioner was the plaintiff in a certain cause originating in the 19th Judicial District Court of McLennan County, Texas, wherein the said plaintiff instituted suit against the Texas Power & Light Company for personal injuries alleged to have been received
140 by him while in the employ of the said defendant, and that said injuries were caused by the negligence of the defendant and without any fault or negligence on the part of the plaintiff, and prayed for damages in the sum of five thousand dollars. Defendant, the Texas Power & Light Company, filed a plea in abatement, alleging that it was the holder of a policy of liability and compensation insurance issued in its favor by the Ætna Life Insurance Company, and that by virtue of the Act of the Thirty-third Legislature of the State of Texas, Chapter 179, known as the Employers' Liability Act or the Workmen's Compensation Act no claim for

liability against it would lie, and that the plaintiff was only entitled to compensation provided in that Act and said compensation must be paid by the Ætna Life Insurance Company, and that by the terms of said Act, plaintiff should look to the insurance company only for his compensation. The plaintiff filed demurrers to said plea in abatement, alleging that the Act relied upon was unconstitutional and void, which demurrers were by the trial court overruled, in effect sustaining the constitutionality of the Act and dismissing plaintiff's cause of action, from which he duly appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas.

The Honorable Court of Civil Appeals at Austin, Texas, held that said act was unconstitutional, in an opinion rendered January 23rd, 1915, in that it violated the 14th Amendment to the Federal Constitution and Section 3, Article 1 of the Texas Constitution. The cause was duly certified by said Court of Civil Appeals to the State Supreme Court and said Supreme Court on April 26th, 1916, sustained the constitutionaiity of the Act and affirmed the decision of the lower court. Whereupon the Court of Civil Appeals, in accordance with the practice in the State of Texas, on June 6th, 1916, held that the decision of the Supreme Court is the law of the case, and set aside its former judgment and affirmed the judgment of the District Court.

By all of said proceedings there was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute and said case was de-
141 cided by the highest court of the state, to-wit, the Supreme Court, on certified questions, and decision rendered thereon by the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, which is the highest court in which a decision of this action could be had.

The Act in question is in part as follows:

Part 1.

Section 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employee, provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence where the violation by such employer of any statute enacted for the safety of the employees, contributed to the injury or death of such employee.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend in such action on

the ground that the injury was caused by the wilful intention of the employee to bring about the injury.

4. Provided however, in all such actions against an employer who is not *an* (a) subscriber as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Section 2. The provisions of this Act shall not apply to actions to recover damages for *the* personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees.

142 Section 3. The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employees for damages for injuries resulting in death, but such employers and their representatives and beneficiaries shall look for compensation solely to the Texas Employers Insurance Association as the same is hereinafter provided for; provided, that all compensation allowed under the succeeding sections herein, shall be exempt from garnishment, attachment and all other suits or claims, as are current wages now exempted by law.

Section 4. Employees whose employers are not at the time of injury subscribers to said association, and the representatives and beneficiaries of deceased employees who at the time of injury were working for non-subscribing employers, cannot participate in the benefits of said Insurance Association, but they shall be entitled to bring suit, and may recover judgment against such employers, or any of them, for all damages sustained by reason of any personal injury received in the course of employment, or by reason of death, resulting from such injury, and the provisions of Section One of this Act shall be applied in all such actions.

The balance of Part 1 of the Act relates to the amount of compensation. Part 2 of the Act relates to the creation of an Industrial Accident Board for the administration of said Act; Part 3 relates to the creation of an insurance association to handle the insurance provisions of the Act, and Part 4 to a few miscellaneous affairs not necessary to set out here.

The plaintiff Middleton in the trial court, in the Court of Civil Appeals and in the State Supreme Court, alleged that said Act was unconstitutional because in violation of the 14th Amendment to the Constitution of the United States in that it was a confiscation of the property of the individual without due process of law, because it deprived a person of his liberty without due process of law, and because it denied equal protection of the law to all citizens and was class legislation, and because the Act was an interference with the rights of an individual to contract; and furthermore, because the different parts of the Act are so intermingled that the good,

143–169 if any, cannot be separated from the bad, and the Act must fall as a whole.

There are attached to and made a part of this petition, the opinions of the Court of Civil Appeals and of the Supreme Court of the State of Texas. The plaintiff in error files with this petition an assignment of errors complained of and prays that a writ of error be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, and that he may have such other and further relief in the premises as he may be entitled to, and for which he will ever pray.

CHAS. B. BRAUN,

Attorneys for Plaintiff in Error, Charlie Middleton.

The writ of error prayed for in the foregoing petition is hereby allowed, and bond for that purpose is fixed at the sum of Five Hundred Dollars, done this 29th day of November, A. D. 1916.

J. C. McREYNOLDS,

Associate Justice of the Supreme Court of the United States.

* * * * * * *

170 Know all men by these presents, That we, Charlie Middleton, as principal, and Chicago Bonding & Surety Co. of Chicago, Illinois, as sureties, are held and firmly bound unto The Texas Power and Light Company in the full and just sum of Five Hundred and 00/100 dollars, to be paid to the said Texas Power and Light Company, or their certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of November, in the year of our Lord one Thousand nine hundred and sixteen.

Whereas, lately at a term of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in a suit depending in said Court between Charlie Middleton, appellant, and Texas Power & Light Co. appellee, a judgment was rendered against the said Charlie Middleton and the said Charlie Middleton having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas Power & Light Co., citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof.

Now, the condition of the above obligation is such, that if the said Charlie Middleton shall prosecute his writ to effect, and answer all

costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] CHARLIE MIDDLETON,
By CHAS. B. BRAUN, *Att'y.*
CHICAGO BONDING & SURETY CO.,
By —— ——,* *Attorney in Fact.*

Sealed and delivered in presence of:
A. E. WILKES.
L. C. WILSON.

Approved by:
J. C. REYNOLDS,
Associate Justice of the Supreme Court of the United States.

---

*Name of attorney in fact absolutely illegible (R. H. Connerly, Clerk).

Endorsed: Chicago Bonding & Surety Co. M. R. Weigle, Mgr., Munsey Building, Washington, D. C. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Dec. 4, 1916. R. H. Connerly, Clerk.

171 In the Supreme Court of the United States.

No. —.

CHARLIE MIDDLETON, Defendant in Error,

v.

TEXAS POWER & LIGHT COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error, Charlie Middleton, and files this his assignment of errors committed by the Court of Civil Appeals and the Supreme Court of the State of Texas, in the disposition of said cause as shown by the record and proceedings therein.

1.

Because the court erred in holding that the trial court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the 14th Amendment to the Constitution of the United States guaranteeing equal protection of the laws to all citizens and prohibiting class legislation.

2.

Because the court erred in holding that the trial court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the 14th Amendment to the Constitution of the United States, in that the same is a confiscation of the property of the individual without due process of law.

3.

Because the court erred in holding that the trial court had not erred in overruling the plaintiff's special exception to the defend-
172 ant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of the plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the 14th Amendment to the Constitution of the United States, in that it deprives the individual of his liberty without due process of law.

4.

Because the court erred in holding that the trial court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said act is an interference with the rights of an individual to contract, all of which is prohibited by law and which is a well recognized principle enunciated by and prohibited by the courts against any unlawful restriction.

5.

Because the court erred in holding that the said Act of the Thirty-third Legislature of the State of Texas, Chapter 179, known as the Employers' Liability Act, was constitutional.

For said errors, the plaintiff prays the Supreme Court of the United States to reverse the judgment rendered in said cause by the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

CHAS. B. BRAUN,

Attorneys for Plaintiff in Error, Charlie Middleton.

Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin, Texas, Dec. 4, 1916. R. H. Connerly, Clerk.

173 Clerk's Office, Court of Civil Appeals, Third Supreme Judicial District.

No. 5408.

CHARLEY MIDDLETON

vs.

TEXAS POWER & LIGHT CO.

McLennan Co.

Affirmed 5-31-1916.

Certified Copy Bill of Costs.

Filing Record	$.50
Docketing Cause	.50
Appearances	1.50
Filing Briefs	1.20
Filing and entering Motions	.35
Orders	2.50
Filing 28 Extra Papers	2.80
Continuances (2)	.40
Judgments	2.00
Taxing Costs	.50
Mandate	1.50
Recording Opinion	8.40
Certified Copy Bill of Costs	.75
Execution for Costs and return	1.50
Notices (39)	19.50
Supreme Court Costs on certified questions	35.95
Transcript to U. S. Supreme Court	87.00
Total	$166.85

174 Clerk's Office, Court of Civil Appeals, Austin, Texas.

Clerk's Certificate.

I, R. H. Connerly, Clerk of the Court of Civil Appeals Third Supreme Judicial District of Texas, do hereby certify that the foregoing 173 pages contain true and correct copies of all matters, things and proceedings had in the District Court of McLennan County, Texas, the said Court of Civil Appeals and the Supreme Court of Texas in the case in said Court of Civil Appeals, numbered 5408, entitled Charlie Middleton, Appellant, vs. Texas Power and Light Company, Appellee, from the District Court of McLennan County, Texas, as

well as having appended hereto the original writ of error and citation in error from the Supreme Court of the United States and having on deposit in my office a copy of the assignment of errors in said Supreme Court of the United States as appear from the transcript and papers now on file in my office.

Witness my hand and the official seal this the 2nd day of January, 1917.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,
Clerk Court of Civil Appeals, Third Supreme Judicial District of Texas.

175 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charlie Middleton, Appellant and Texas Power and Light Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title,
176 right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Appellant, Charlie Middleton, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the twenty-ninth day of November, in the year of our Lord one thousand nine hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by

J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

[Endorsed on back of page 175:] Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 4, 1916. R. H. Connerly, Clerk.

[Endorsed:] Supreme Court of the United States, October Term, 1916. Charlie Middleton, Plaintiff in Error, vs. Texas Power and Light Company. Writ of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 4, 1916. R. H. Connerly, Clerk.

177 UNITED STATES OF AMERICA, *ss:*

To Texas Power and Light Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas wherein Charlie Middleton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. McReynolds, Associate Justice of the Supreme Court of the United States, this twenty-ninth day of November, in the year of our Lord one thousand nine hundred and sixteen.

J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

178 On this 6th day of December, in the year of our Lord one thousand nine hundred and Sixteen, personally appeared George M. Feild before me, the subscriber, and makes oath that he delivered a true copy of the within citation to F. R. Slater, the Vice President and General Manager of the Texas Power & Light Co., on the 5th day of December, 1916, in person, in the City and County of Dallas and State of Texas.

GEO. M. FEILD.

Sworn to and subscribed the 6th day of December, A. D. 1916.

[Seal Notary Public, County of Dallas, Texas.]

NELLIE GOODE,
Notary Public, Dallas County, Texas.

[Endorsed:] Filed in Court of Civil Appeals, 3rd Supreme Judicial District of Texas, Dec. 14th, 1916. R. H. Connerly, Clerk.

179 In the Supreme Court of the United States.

CHARLIE MIDDLETON, Plaintiff in Error,

vs.

TEXAS POWER & LIGHT COMPANY, Defendant in Error.

We, the undersigned attorneys of record, agree that the following shall constitute the printed record for the Supreme Court in the above styled cause:

Caption on pages 1 and 2.
Plaintiff's petition on pages 3 and 4.
Of plaintiff's supplemental petition:
General demurrer on page 5.
Paragraph 5 on page 8.
Paragraph 6 on page 9.
Paragraph 7 on page- 9 and 10.
Paragraph 8 on page 10.
Paragraph 11 on page 12.
Prayer to said supplemental petition page 27.

Of defendant's amended original answer:
Those portions on pages 28 through 30.
The judgment page 32.

Of the motion of plaintiff for new trial:
Paragraph 1 on page 33.
Paragraphs 6, 7, 8, 9 and 12 on page 35.
Order on said motion on page 38.

Of bills of exception of plaintiff in error:
Bill No. 1 on pages 38 and 39.
Bill No. 5 on pages 45 and 46.
Bill No. 6 on page- 46 and 47.
Bill No. 7 on pages 47 and 48.
Bill No. 8 on pages 49 and 50.
Bill No. 11 on pages 52 and 53.

Of assignments of error of plaintiff in error:
Caption on page 79.
Paragraphs 5 and 6 on page 81.
Paragraph 7 on page- 81 and 82.
Paragraph 8 on page 82.
Paragraph 10 on pages 82 and 83.

The record from page 85, commencing with bond, to end, shall be printed, with the exception of the opinion of the Court of Civil Appeals on pages 143 to 157, and of the Supreme Court pages 158 to 169, it appearing that said opinions have been duplicated in the certified copy, said opinions appearing on pages 91 to 104 and pages 125 to 136.

Witness our hands this the 6th day of January, A. D. 1917.

O. K. CHAS. B. BRAUN,
For Plaintiff in Error.

O. K. HARRY P. LAWTHER,
Att'y for Def't in Error.

[Endorsed:] 874. 25704.

180 [Endorsed:] File No. 25704. Supreme Court U. S., October Term, 1916. Term No. 874. Charlie Middleton, Pl'ff in Error, vs. Texas Power & Light Company. Stipulation as to parts of record to be printed. Filed January 17, 1917. *191*

Endorsed on cover: File No. 25,704. Texas Court of Civil Appeals, Third Supreme Judicial District. Term No. 874. Charlie Middleton, plaintiff in error, vs. Texas Power and Light Company. Filed January 17th, 1917. File No. 25,704.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. [redacted]102

CHARLIE MIDDLETON, Plaintiff in Error,

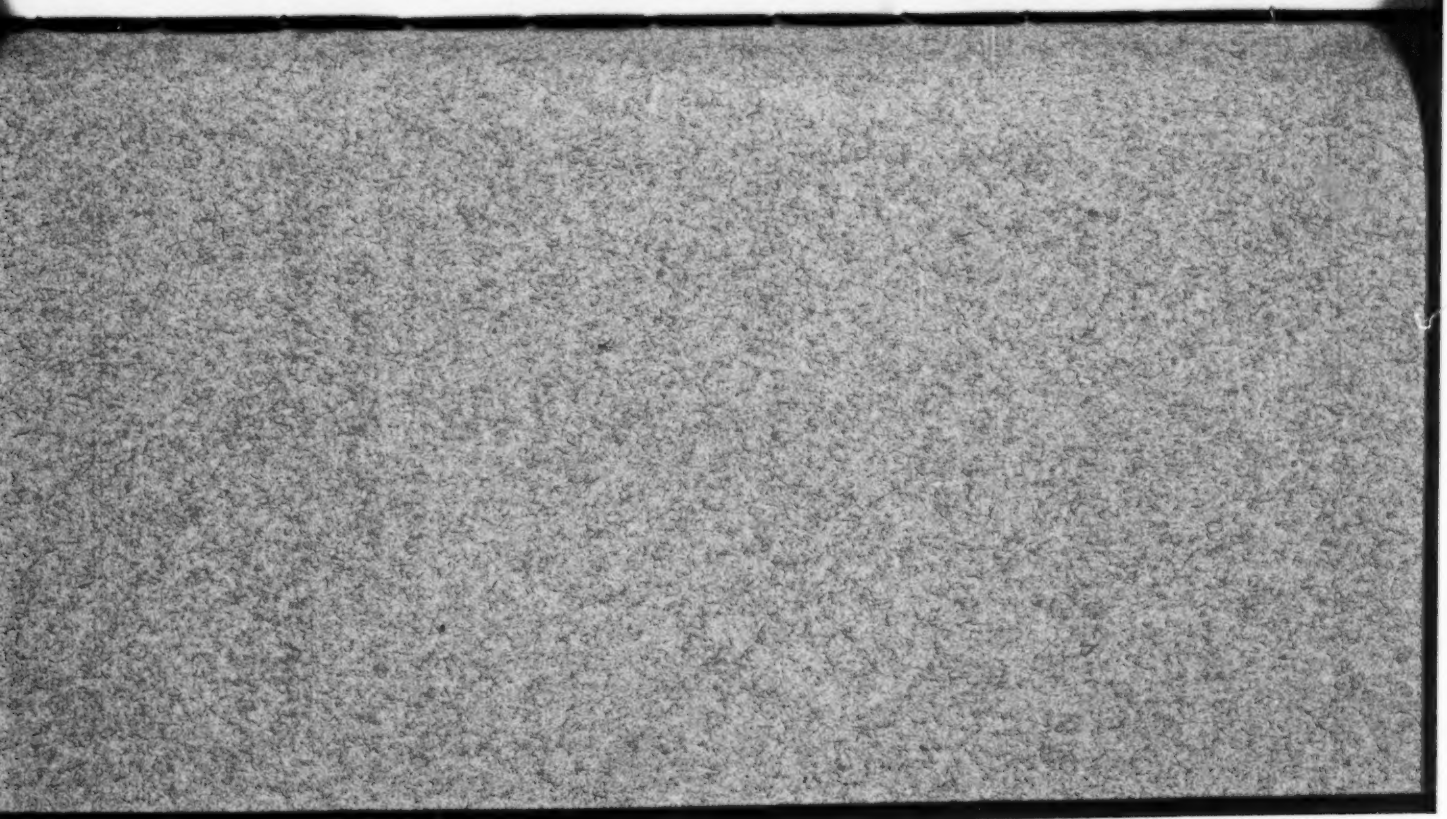
vs.

TEXAS POWER AND LIGHT COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF OF PLAINTIFF IN ERROR.

CHAS. B. BRAUN,
Attorney for Plaintiff in Error.



INDEX

CASES CITED. PAGES IN BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 368.

CHARLIE MIDDLETON, Plaintiff in Error,

vs.

TEXAS POWER AND LIGHT COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On December 23, 1913, in the Nineteenth Judicial District Court of McLennan County, Texas, Charlie Middleton instituted suit against the Texas Power and Light Company for personal injuries alleged to have been received by him on or about December 6, 1913, while he was in the employ of the said defendant, and alleged that his injuries were due to the negligence of the defendant, and prayed for damages in the sum of Five Thousand Dollars.

The Texas Power and Light Company, defendant in the Court below, answered the petition and alleged that by virtue of the Act of the Thirty-third Legislature, Chapter 179, known as the Employers' Liability Act or the Workmen's Compensation Act, it had taken out insurance in the Aetna Life Insurance Company, and had complied with all the provisions of said law. It further alleged that no question arising under the Act had been referred to or determined by the Industrial Accident Board, as provided by said Act, and therefore, because of said Act, it could not be sued, but that suit, if any, should be brought against the insurance company, and therefore the cause of the plaintiff should be dismissed.

The plaintiff answered by supplemental petition, alleging that the law relied upon by the defendant, to-wit: the Texas Employers' Liability Act, was unconstitutional and void and therefore that said plea in abatement should be overruled and the cause be maintained in the Court on its merits.

The trial Court heard the demurrers of the plaintiff to the defendant's plea in abatement, overruled the same. and dismissed the plaintiff's cause of action, holding the law to be constitutional. (Tr. pp. 9 and 10.) Plaintiff duly filed a motion for new trial,(Tr. pp. 10 and 11) which was overruled and plaintiff gave notice of appeal to the Court of Civil Appeals, (Tr. pp. 11 and 12.) Appeal was duly perfected, and the Court of Civil Appeals in an opinion rendered January 23, 1915, held the Act insofar as it applied to the plaintiff to be unconstitutional. (Tr. pp. 24-36.) The cause was then carried to the Supreme Court of the State of Texas on certified questions, which were answered by the Supreme Court, (Tr. p. 45) in which said Court held the Act to be constitutional, and the matter was referred back to the Court of Civil Appeals.

The plaintiff raised the question in the trial Court by

supplemental plea that the Act was unconstitutional, being violative of the Fourteenth Amendment to the Constitution of the United States, (Tr. pp. 4-7.) Plaintiff raised the same questions in motion for new trial, (Tr. pp. 10 and 11) and on appeal, by bills of exception. (Tr. pp. 12-19.) The Court of Civil Appeals held the Act unconstitutional and ordered the cause to be reversed and remanded to the Court below for further proceeding. The defendant applied for a rehearing in said Court, and prayed that the question be certified to the Supreme Court, which was done. (Tr. p. 23.) The certified questions were answered by the Supreme Court, said Court holding the Act constitutional, (Tr. pp. 45-52) and remanded the case to the Court of Civil Appeals, and that Court reversed their former ruling and affirmed the judgment of the District Court and held the Act constitutional. (Tr. pp. 55-56.)

Thereupon the plaintiff in error applied to the Honorable Supreme Court of the United States for a writ of error to review the action of the said Court of Civil Appeals, on the ground that said Texas Employers' Liability Act is unconstitutional and void and in conflict with the Fourteenth Amendment to the Constitution of the United States. This application for a writ was granted by the Honorable J. C. McReynolds. (Tr. pp. 56-59.) Attached to said application were the assignments of error of the plaintiff in error, (Tr. pp. 60-61) and the plaintiff in error is before this Court on said assignments of error.

In the balance of the brief the plaintiff in error will be referred to as plaintiff, and the defendant in error as defendant.

FIRST ASSIGNMENT OF ERROR.

Because the Court erred in holding that the trial Court had not erred in overruling the plaintiff's special excep-

tion to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the Fourteenth Amendment to the Constitution of the United States guaranteeing equal protection of the laws to all citizens and prohibiting class legislation. (Tr. p. 60.)

STATEMENT.

Petition to Court for writ of error as follows:

To the Honorable Supreme Court of the United States:

Now by his attorney comes Charlie Middleton of McLennan County, Texas, original plaintiff in the above entitled and numbered cause, and prays for the allowance of a writ of error, and respectfully shows:

That petitioner was the plaintiff in a certain cause originating in the Nineteenth Judicial District Court of McLennan County, Texas, wherein the said plaintiff instituted suit against the Texas Power and Light Com-
140 pany for personal injuries alleged to have been received by him while in the employ of the said defendant, and that said injuries were caused by the negligence of the defendant and without any fault or negligence on the part of the plaintiff, and prayed for damages in the sum of five thousand dollars. Defendant, the Texas Power and Light Company, filed a plea in abatement, alleging that it was the holder of a policy of liability and compensation insurance issued in its favor by the Ætna Life Insurance Company, and that by virtue of the Act of the Thirty-third Legislature of the State of Texas, Chapter 179, known as the Employers' Liability Act or the Workmen's Compensation Act no claim for liability against it would lie, and that the plaintiff was only entitled to compensation provided in that Act and said compensation must be paid by the Ætna Life Insurance Company, and that by the terms of said Act, plaintiff should look to the insurance company only for his compensation.

The plaintiff filed demurrers to said plea in abatement, alleging that the Act relied upon was unconstitutional and void, which demurrers were by the trial Court overruled, in effect sustaining the constitutionality of the Act and dismissing plaintiff's cause of action, from which he duly appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas.

The Honorable Court of Civil Appeals at Austin, Texas, held that said act was unconstitutional, in an opinion rendered January 23, 1915, in that it violated the Fourteenth Amendment to the Federal Constitution and Section 3, Article 1 of the Texas Constitution. The cause was duly certified by said Court of Civil Appeals to the State Supreme Court and said Supreme Court on April 26, 1916, sustained the constitutionality of the Act and affirmed the decision of the lower Court. Whereupon the Court of Civil Appeals, in accordance with the practice in the State of Texas, on June 6, 1916, held that the decision of the Supreme Court is the law of the case, and set aside its former judgment and affirmed the judgment of the District Court.

By all of said proceedings there was drawn in question the validity of a statute of the State of Texas on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute and said case was decided by
141 the highest Court of the State, to-wit: the Supreme Court, on certified question, and decision rendered thereon by the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, which is the highest Court in which a decision of this action could be had.

The Act in question is in part as follows:

Part 1.

Section 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employee, provided that no such employee who may be injured or killed shall be held to have

been guilty of contributory negligence where the violation by such employer of any statute enacted for the safety of the employees, contributed to the injury or death of such employee.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury.

4. Provided, however, in all such actions against an employer who is not an (a) subscriber as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Section 2. The provisions of this Act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more
142 than five employees.

Section 3. The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employees for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employers Insurance Association as the same is hereinafter provided for; provided, that all compensation allowed under the succeeding sections herein, shall be exempt from garnishment, attachment and all other suits or claims, as are current wages now exempted by law.

Section 4. Employees whose employers are not at the time of injury subscribers to said association, and the representatives and beneficiaries of deceased employees who at the time of injury were working for non-subscribing employers, cannot participate in the benefits of said in-

surance association, but they shall be entitled to bring suit, and may recover judgment against such employers, or any of them, for all damages sustained by reason of any personal injury received in the course of employment, or by reason of death, resulting from such injury, and the provisions of Section 1 of this Act shall be applied in all such actions.

The balance of Part 1 of the Act relates to the amount of compensation. Part 2 of the Act relates to the creation of an Industrial Accident Board for the administration of said Act; Part 3 relates to the creation of an insurance association to handle the insurance provisions of the Act, and Part 4 to a few miscellaneous affairs not necessary to set out here.

The plaintiff Middleton in the trial Court, in the Court of Civil Appeals and in the State Supreme Court, alleged that said Act was unconstitutional because in violation of the Fourteenth Amendment to the Constitution of the United States in that it was a confiscation of the property of the individual without due process of law, because it deprived a person of his liberty without due process of law, and because it denied equal protection of the law to all citizens and was class legislation, and because the Act was an interference with the rights of an individual to contract; and furthermore, because the different parts of the Act are so intermingled that the good, if 143-169 any, cannot be separated from the bad, and the Act must fall as a whole.

There are attached to and made a part of this petition, the opinions of the Court of Civil Appeals and of the Supreme Court of the State of Texas. The plaintiff in error files with this petition an assignment of errors complained of and prays that a writ of error be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, and that he may have such other and further relief in the premises as he may be entitled to, and for which he will ever pray.

CHAS. B. BRAUN,
Attorney for Plaintiff in Error, Charlie Middleton.

The writ of error prayed for in the foregoing petition is hereby allowed, and bond for that purpose is fixed at the

sum of Five Hundred Dollars, done this 29th day of November, A. D. 1916.

J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

(The entire Act will be found at the end of this brief.)

AUTHORITIES.

Yickwo vs. Hopkins, 118 U. S., 356.
Lochner vs. New York, 198 U. S., 52.
Connolly vs. Union Sewer Pipe Co., 184 U. S., 539.
G., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150.
Kentucky State Journal Co. vs. Workmen's Comp. Bd., 161 Ky., 562; L. R. A., 1916-A, 389.
In re Opinion of Justices, 209 Mass., 607.
Deibeikis vs. Link Belt Co., 261 Ill., 454.
Matheson vs. Minneapolis St. Ry. Co., 148 N. W., 71.
Sayles vs. Foley, 96 Atl., 340; 12 N. C. C. A., 957.

ARGUMENT.

In presenting this case to this Honorable Court we realize that compensation acts have been passed on by the highest Courts of a number of States, and that this Court has had occasion to pass on the constitutionality of the laws of several States, but a close examination of the cases quoted fails to reveal any act similar to the Texas Act, and we feel therefore that this Act should be construed by the highest Court in the land. We realize that compensation acts are here to stay, and mark the progress which is being made along all lines in civilized communities, and that such acts are only a step in the onward progress of the race toward better things and more equitable and reasonable adjustments of the burdens caused by modern industrialism and civilization. However, no matter how great the economic evils to be remedied, no mat-

ter how great the benefits to be obtained by legislation, all acts must be made with a view to observing the rights guaranteed by the ever-living law of the land, the Constitution, both State and National. It seems to be argued by the adherents to the constitutionality of this Act and other acts, that because the end is a consummation devoutly to be wished, the means are negligible and may be either brushed aside or treated with the slight deference which their inconsequence demands. We realize that there are special considerations, economic, humane and equitable, which merit, even demand, legislation on the part of industrial workers. As a part of such legislation, laws to relieve their necessities and the necessities of their dependents when affliction and inability to work overtake them, are commendable and just, but it must not be forgotten in seeking such beneficent results, that there are others interested, that there are others whose welfare is at stake, and that all laws must finally be construed according to the Constitution, and if a man's rights as guaranteed by that Constitution are infringed, then the law, no matter how much needed from an economic standpoint, must fall. In these succeeding pages we shall endeavor to show that the law in question falls far short of meeting the constitutional requirements of the Fourteenth Amendment to the Constitution of the United States.

The essential difference between this Act and practically all other acts, is its compulsory character. In none of the cases decided by any Court in the country has this matter been raised by an employee. Practically all other acts are optional in character, with the exception of the New York Act, the California Act, the Washington Act, and in some respects the Ohio Act, but the question as to its compulsory nature has not been raised from the standpoint of the industrial wage-earner, and it is our intention to call this Court's attention to the rights of the wage-

earner as infringed by the compulsory nature of this class of legislation.

We will first consider the Act as being discriminatory and a denial of equal protection of the law as applied to the employer and employee. Unquestionably the Texas Act is optional as to the employer; he has his choice and may or may not become a subscriber. If he becomes a subscriber he pays certain premiums and is thereby relieved from all liability from a suit at law. If he does not become a subscriber he is liable to a suit at law in which he loses the defenses of fellow servant, assumed risk and contributory negligence. But on the other hand, the law is absolutely compulsory as to the employee, and allows him no choice whatsoever as to whether he will accept or reject its terms. In this respect the Act is far different from practically every act in the country. It is true that a man doesn't have to work, from the standpoint of a theory, and that every man has the privilege of declining to accept employment from any particular person or corporation, but if he pursues this course he has not exercised any option as an employee, but he has merely declined to become an employee.

The statute therefore presents to the employer two laws differing very widely and radically concerning his liability to his employee, and he, the employer, has the right as to which law shall fix the rights of his employee as against him. Therefore, has the Legislature under the guise of the police power, the right to enact a law that embodies such a fundamental and far-reaching discrimination in favor of the employer and against the employee? We clearly think that the constitutional rights granted to every man are thereby infringed, and therefore the Act which deprives the employee of any option, is null and void.

This Court in the case of Yickwo vs. Hopkins was called

upon to decide a case which we think is analogous to the case at bar, in which this Court said:

"The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race. For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

We know of no stronger language to condemn the discriminatory legislation of this kind than the language we have just quoted coming from this Honorable Court.

Let us therefore pass to another phase of the discriminatory character of this legislation as applied to the employee in relation to other employees. This Act exempts from its operation employees of any railway operating as a common carrier, laborers engaged in working for a cotton gin, and employees of any person, firm or corporation having in his or their employ not more than five employees, all domestic servants and farm laborers. We therefore have employees of the excepted classes entitled to certain privileges which are denied employees of the non-excepted classes, when, as a matter of fact, there is no distinction to be drawn. Any attempt on the part of the Legislature to classify the subjects of the legislation, must be based upon some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection, and the rule is that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed.

The original compensation acts applied to industries which were extra hazardous and were called for because

of the large number of maimed and killed resulting from those industries. Little by little the legislatures enlarged upon this until compensation acts now reach most every conceivable form of activity. In this Act laborers of the cotton gin are excluded, for what reason we do not know. The laborer at a cotton gin is exposed to a great many hazards. In order to support this arbitrary classification, the Court will be obliged to go further than it has ever gone before and say that the reason why the legislature arbitrarily selected cotton gins and excluded them from the operation of the Act is not a subject of judicial inquiry. It is generally the opinion that this occupation is as hazardous as that of practically any industry in the country. If the object of this legislation is to benefit the wage-earner, and especially those liable to injury and death, so as to prevent them from becoming a charge upon the State, why is an extra hazardous industry such as the cotton gin exempted? Why is an employee of a cotton gin given the privilege which he has always had, when that privilege is denied an employee such as the plaintiff, when he is not even in a hazardous business? Employees engaged in working for railroads who are not concerned in the actual operation of the trains, retain their old status and can sue at common law, whereas, an employee such as the plaintiff is denied that privilege. Why this classification, and can this Court hold that it is not arbitrary and unreasonable? We believe therefore that employees of cotton gins and employees of railroads not engaged in the operation of trains, are given a privilege which is denied to the plaintiff Middleton, and that there is no just reason for such classification, but that a classification such as this is based upon an artificial reason and not a natural one, and therefore in line with the unbroken authorities, constitutes a real violation of the rights of the plaintiff as guaranteed to him by the Fourteenth Amendment.

Again the rights of the plaintiff and others similarly situated are infringed in this manner: For instance, the telephone company operating in a city is a subscriber to the Act. A hotel in the same city is not a subscriber. A girl working for the telephone company is deprived of her right to elect whether she will take under the Act or whether she will retain her former status and sue at common law, whereas, the girl working in the telephone exchange of the hotel is pursuing the same occupation, doing exactly the same duties, but is operating under an entirely different law. Is this a reasonable and just classification, or is it unreasonable and arbitrary? For instance, there are two telephone companies operating in a city, one the Independent and the other the Southwestern. The Independent company subscribes to the Act and its employees must take under that Act, being allowed no option. The Southwestern company does not subscribe to the Act and its employees retain the same privilege they have always had. Therefore, employees of one company, while doing exactly the same work, exposed to the same hazards, and running the same risks, are working and operating under an entirely different law from that of the employees of the other company. The employees of the Southwestern company have the right and privilege of suing as they see fit, whereas, the employee of the Independent company is forced into an agreement without any option on his part to accept the law which his employer says he must accept, and he must receive compensation regardless of what he wants in the premises. There are two companies furnishing light and power to a city, one the Texas Power and Light Company and the other some other concern. The Texas Power and Light Company is a subscriber under the Act and therefore its employee Middleton must accept compensation as provided for in that Act, whether he is willing to or not, whereas, the em-

ployee of the other company, doing exactly the same work, exposed to the same hazards, is not forced to accept any such compensation, but retains the privileges he always has had. It is a fundamental rule that such legislation as this must not only operate equally upon all within a class, but the classification must furnish a reason for and justify the making of the class. That is, the reason for the classification must inhere in the subject matter and rest upon some reason which is natural and substantial. Taking the above illustrations as showing the inequalities of the law, can this Court hold that this legislation acts equally upon all within a class, when, as we have shown, some are affected by this law and some are not, when they are in exactly the same class, pursuing the same work, and exposed to the same hazards and dangers? Can this Court hold that the reason for such a classification is natural and substantial?

We cannot see that the decision of the New York Court in the Jensen case, and the decision of this Court in the White case is decisive of the question here raised. The New York Act is applicable to certain extra hazardous employments which are enumerated, and because of the unusual character of those employments, with the great danger to society of a larger number of people being maimed and dependent, the police power of the State can be extended to cover such legislation. But the Act in question is not applicable to only extra hazardous employments, but is applicable to everything from the most hazardous employment down to the office boy who empties the waste-basket in some office. With an Act having such a far-reaching effect and bringing within its domain so many diversified industries, there surely must be a limit to how far the so-called police power can go in protecting the health, safety, morals, etc., of the people. Besides this, this precise question was not raised in this Honor-

able Court, and was only partly raised on oral argument in the Jensen case.

The California Act is compulsory as to both employer and employee, and raises an entirely different question of law. The Washington Act is compulsory as to both, and is applicable only to certain extra hazardous industries, and any decision in that case is not controlling in this case. As we stated at the outset, the question here raised is raised by an industrial wage-earner, and is to be passed upon for the first time by this Court, or by any Court outside of the State of Texas. There is much authority to be found in the decisions of the various State Courts for the position we are taking here. In the case of Kentucky State Journal Company vs. Workmen's Compensation Board, 161 Ky., 562; L. R. A. 1916-A, 389, the Court said:

"This Court looks with great favor upon a workmen's compensation act that would deal justly with the employer and employee, one that would permit both to voluntarily take shelter under its provisions."

The Massachusetts Court in re Opinion of Justices, 209 Mass., 607, stated:

"The effect is to leave it at the employee's option whether he will or will not waive his right of action at common law. There is nothing in the Act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the Act. Taking into account the non-compulsory character of the proposed Act, we see nothing in any of these provisions which is not in conformity with the Fourteenth Amendment to the Federal Constitution."

In the case of Deibeikis vs. Link Belt Company, 261 Ill., 454, the Supreme Court of Illinois said:

"The other objections urged may all be answered by the statement that the Act is elective and not compulsory.

Were the Act deprived of its elective feature and made compulsory upon every employer and employee engaged in the enterprises enumerated in Section 2, very different and more serious questions would be presented. Being elective, the Act does not become effective as to any employer or employee unless such employer and employee chooses to come within its provisions."

In the case of Matheson vs. Minneapolis Street Ry. Co., 148 N. W., 71, the Supreme Court of Minnesota said:

"So long as the privilege is given them, that is, employee and employer, to elect whether they will or will not become bound by the provisions thereof, the agreement is voluntary, and none of the constitutional rights of the parties are infringed by requiring that the terms of the agreement if entered into shall be those prescribed by the Act."

The Supreme Court of Rhode Island in the case of Sayles vs. Foley, 96 Atlantic, 340; 12 N. C. C. A., 957, states, after making some statements about the classification:

"Strictly speaking, this is all the classification made by the Act, but the employer and his employee may change their relation under the law by voluntary action. If the employer elects to become subject to the compensation provisions of the Act, then every employee of his also has the opportunity of choosing to accept the compensation scheme or to retain his rights at common law."

And the Court makes the further statement that of twenty-four acts, all have the elective feature with the exception of the Washington and California Acts, to both of which we have previously referred.

These quotations from the different State Courts could be multiplied, but we do not deem it necessary to call this Court's attention to the various decisions on this point, since this proposition is clearly raised by the decisions in

question, that is, that the question of an election or option on the part of the employee goes to the root of the whole matter. If the employee is deprived of this election, then his rights are infringed, and then he is subjected to a discrimination to which others in the same class and condition and calling are not subjected. This Court in the case of Gulf, Colorado and Santa Fe vs. Ellis, supra, stated that an act which said all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not so subject, will be unconstitutional. Can this Court say that employees of all subscribers to the Act shall be subject to the discriminations of that Act, and all employees of the non-subscribers shall not be subject thereto, when the employees of both the non-subscriber and the subscriber are in the same general condition, calling and class? And this Court further held in the Ellis case: "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand in no manner restraining State action."

We think that the New York Act, California Act and Washington Act are clearly acts in the nature of a tax on business. As was said by this Court in the Connolly vs. Union Sewer Pipe Company case: "The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State ex-

erts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, but different considerations control when the State by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things while allowing another and favored class engaged in the same domestic trade, to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly to build up or protect particular interests or industries. It is quite a different thing for the State under its general police power to enter the domain of trade and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

Clearly, the Act of Texas cannot be held to be a tax on industries, but it is merely and simply an attempt to provide for the maintenance and upkeep of people maimed and injured, or for their dependents if killed. Such a classification must be based upon reasonable and natural reasons and not upon arbitrary and unnatural selections as was done in this case, when, as we have previously

pointed out, the employees of a certain kind are subjected to burdens, liabilities and duties which are not imposed upon employees in the same and similar classes, condition and calling.

Therefore, for the reasons above pointed out, in the different phases as we have outlined it, we feel that the Act in question infringes upon that constitutional guarantee that all people shall have the equal protection of the laws, for as has been said, the equal protection of the law is the protection of equal laws. We therefore earnestly believe that the Act in question is violative of the equal protection clause of the Fourteenth Amendment in the three ways above set out, and therefore the Act is void and unconstitutional and the judgment of the Courts should be reversed and the cause remanded to the District Court of McLennan County for further action.

SECOND ASSIGNMENT OF ERROR.

Because the Court erred in holding that the trial Court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the Fourteenth Amendment to the Constitution of the United States, in that the same is a confiscation of the property of the individual without due process of law. (Tr. p. 61.)

THIRD ASSIGNMENT OF ERROR.

Because the Court erred in holding that the trial Court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by

the defendant in support of the plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said Act directly and specifically violates and conflicts with the Fourteenth Amendment to the Constitution of the United States, in that it deprives the individual of his liberty without due process of law. (Tr. p. 61.)

STATEMENT.

We refer the Court to the foregoing statement.

AUTHORITIES.

Same as above, and
Hanson vs. Krehbiel, 64 L. R. A., 790.
In re Opinion of Justices, 98 N. E., 337.
Herkey vs. Agar Mfg. Co., 153 N. Y., Supp. 369.

ARGUMENT.

Due process of law has been variously defined, possibly the most famous decision being taken from the Dartmouth College case, as follows:

"By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

"The right of property is the right to acquire, possess and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State."

"Liberty is the right of one to use his faculties in all lawful ways, to live and work where he may, to earn his

livelihood in any lawful calling and to pursue any lawful trade or avocation."

The highest Court in New York in the Ives case passed upon this question from the standpoint of the employer, but from the standpoint of the employee the question is still undecided. Viewing the Texas Act from the standpoint of an employee such as the plaintiff here, we find that no matter how wilful or how gross may be the negligence of the employer, the employee who is deprived of limb, health or capacity to work through such negligence is deprived of the cause of action against such employer. In other words, his limb, health and capacity to work are taken away from him by negligence, and no cause of action is given him against the offending party. Instead thereof, he must look to some insurance company. Therefore, by the provisions of this Act, is a party litigant entitled to be heard before a tribunal which is either to condemn or acquit? Is the Act such an Act as under its terms the tribunal which sits to pass upon the merits and demerits of the case must make inquiry or hear testimony or is it a pre-judged case? The questions of fact, of liability and of negligence are conclusively presumed against one or both parties, and therefore said employee is clearly deprived of his rights and of his liberty without due process of law. The effect of this Act is not to permit a remedy by due course of law against the wrong-doer, but permits the wrong-doer to shift responsibility on to another person of his own choice, and to provide for an arbitrary and maximum award of damages. If due process of law means anything, if it means a man's right to his liberty, and if his property must be passed upon by a tribunal which hears before it condemns, it then means that a law which provides that a party suffering injury shall have no remedy against the party committing the injury, is unconstitutional and void, and the

Act in question which says that an employee shall not have his remedy against such party, must be void.

In the case of Hanson vs. Krehbiel, 64 L. R. A., 790, the Supreme Court of Kansas had before it a statute which permitted the publisher of a libelous publication to make a full and fair retraction of such defamatory article; and that, in the event of such retraction, the plaintiff should recover actual damages. The Supreme Court said:

"The retraction required by the Act in question may or may not be a full reparation for the injury suffered. It might rather aggravate the injury or effect than molify it. It is sufficient to say, however, that all these are questions for the Courts upon proper notice to all parties, and may not be determined arbitrarily by an act of the legislature."

In this opinion the Court also said:

"To refuse hearing and remedy for injury after its infliction, is simply removed from infliction of penalty before and without hearing."

In re Opinion of Justices, 98 N. E., 337, it was declared by the Supreme Court of Massachusetts that a statute providing that an action against a trade union or an association of employers, or against members or officials thereof, on behalf of themselves and of other members of a trade union or association of employers, for tort, shall not be entertained by any Court, was in conflict with both the State and Federal Constitution.

The Illinois Court in the case of Deibeikis said:

"It is contended that Section 9 deprives the employee of his liberty and property. These contentions are fully answered by the statement that the employee is not compelled to submit to the provisions of the Act, but has the power to elect whether or not he will come within its terms and be bound by them. If any of the provisions of the Act are objectionable to him, he is not required to

subject himself to the Act. If he does elect to do so he cannot be heard to complain that the contract he voluntarily entered into is an unsatisfactory one."

Since the plaintiff Middleton was forced to accept the provisions of this Act, he certainly can be heard to complain that the contract was an unsatisfactory one. Any argument to the effect that the employee has merely to refuse to accept employment in order to escape the provisions of the Act, is absurd on its face. Our country maintained the rights of its citizens to travel on the high seas and not be subjected to the perils of the U-boats of Germany and thereby lose their life, liberty and property. This is a right which our country felt was accorded its citizens by international law. It is true that our citizens could have escaped the perils of the submarine by voluntarily refusing to go abroad on any boat, but that would not give Germany the right to submarine. Germany advanced this argument in justification of the destruction of the Lusitania, and warned that it proposed to destroy the Lusitania. Conceding that this destruction would impose an illegal loss upon American lives and property, Americans were formally warned of the liability they would incur by traveling or sending goods on that ship. Full opportunity was thus given them not to travel or to ship goods. Self-interest demanded that they do one or the other. If they refrained from traveling or shipping they were unharmed. If they traveled or shipped they were liable to be harmed. But such arguments as these would not deprive them of the rights granted to them by international law, and such an argument that an employee need not enlist in the service of the subscribing employer is absurd on its face.

For a clear discussion of this phase we refer the Court to the opinion of Justice Crane in the case of Herkey vs. Agar Mfg. Co., 153 N. Y., Supp. 369.

"So we come to the question whether an employee may be compelled to accept a certain sum of money by a legislative fiat for an injury done to him through negligence. Can the legislature take away altogether the right to recover damages which a person sustains by reason of the failure of another individual to exercise reasonable care? Can the State deprive its citizens of all remedy for negligence? A man has a right under well-organized government to be protected from the carelessness and negligence of others. A failure to exercise the ordinary care used in a given society, resulting in an injury, is a violation of the inherent rights of the injured member of that society. It will be conceded that the legislature cannot take away all remedy for injurious trespass upon property. That is, a law which should provide that no action could be maintained in the Courts of the State for an injury done to real property, would violate the Fourteenth Amendment. Would not a law likewise be unconstitutional which should provide that no cause of action could be maintained thereafter to recover the damages inflicted by an assault, or by a libel destroying reputation, or through malicious prosecution, or by false arrest? All these matters pertain to a man's security of person and enjoyment of his liberty, and for the legislature to take away all remedy for such wrongs is the same as legislating that such wrongs may be committed. We are unable to perceive the difference in principle between an act seeking to divest them (rights) directly and one providing that where they have been divested by unlawful violence, no remedy shall be had against the wrong-doer. To permit others to libel, assault, or falsely arrest an individual without providing a remedy for such acts, is to deprive a man of his life and of his liberty as those words have been construed. Likewise, it deprives a man of his life and of his liberty within the meaning of the Consti-

tution to permit others to negligently injure him and provide no remedy. There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is true that a person has no property, no vested interest, in any rule of the common law, but this certainly does not mean that any and every rule of the common law can be changed at the whim of the legislature, for it distinctly says that rights of property which have been created by the common law cannot be taken away without due process. But rights to life and liberty are equally protected by the Constitution, and these rights are but a rule of the common law. If the legislature, therefore, cannot take away the cause of action for assault, for libel, or for negligence, except where it has created such cause of action, can it limit the damages to be recovered therein by a schedule of prices? It is evident that it could not limit the damage to be recovered for injury to real or personal property, as this would be clearly taking property without due process. Likewise, it cannot limit a recovery for actual damage sustained through assault, libel or negligence, for this would be in effect depriving a person of life and liberty. If it can arbitrarily fix the amount, it can fix it so low or so high as to be a deprivation of all protection and of all personal or property rights.

And this Honorable Court in the case of Yickwo vs. Hopkins, supra, held:

"The Fourteenth Amendment undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy

property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Keeping clearly in mind the fact that this Act is absolutely compulsory upon the employee, we are constrained to believe that he is deprived of his liberty and of his property without due process of law. We believe that this contention on our part is amply sustained by the authorities of Courts, both State and National, and that this Act which in effect undertakes to deprive the plaintiff Middleton of his liberty and of his property without due process of law, is unconstitutional and void.

FOURTH ASSIGNMENT OF ERROR.

Because the Court erred in holding that the trial Court had not erred in overruling the plaintiff's special exception to the defendant's plea in abatement, for the reason that the Texas Employers' Liability Act relied upon by the defendant in support of its plea in abatement, is unconstitutional and without binding force and effect upon the plaintiff, because said act is an interference with the rights of an individual to contract, all of which is pro-

hibited by law and which is a well recognized principle enunciated by and prohibited by the Courts against any unlawful restriction. (Tr. p. 61.)

STATEMENT.

Same as above.

AUTHORITIES.

Same as above, and

Hunter vs. Colfax Consolidated Coal Co., 154 N. W., 1037; 11 N. C. C. A., 886.

Western Indemnity Co. vs. Pillsbury, 10 N. C. C. A., 45. (Dissenting opinion.)

Coppage vs. Kansas, 236 U. S., 1.

Truax vs. Raich, 239 U. S., 33-41.

ARGUMENT.

As pointed out before, practically all the acts in this country give an employee the option of entering into an agreement with his employer as to how the rights and liabilities of that employee and his particular employer shall be adjudicated. The employee is given the option of what kind of a contract he will enter into for the protection of his life, his liberty and his property, whereas, in the instant case, he is not given this option, but is compelled to come within the terms of this Act at the will of his employer. Can the State of Texas, in the exercise of its so-called police power, unduly interfere with the rights of the individual when he attempts to enter into a contract necessary and essential to the enjoyment of the inherent rights belonging to him? Can it say, "You cannot contract as you see fit when even the contract does not influence or affect in any manner society as a whole." Each man should be free in the enjoyment of all of his faculties. Our Constitution grants him the privilege to

exercise these faculties granted unto him in a lawful way. The purpose of our laws is to let man live and work where he chooses, to earn his livelihood by any lawful calling or avocation in life, and when these fundamental and cardinal principles are infringed upon, the principles upon which this government is founded are hanging in the balance, and it then devolves upon the judiciary to protect, uphold and sustain them by the Constitution and to step in and utter a rebuke to such legislation.

Under the terms of this Act the employee of a subscriber is forced to sell his labor upon terms revolting to him and utterly without his consent. By the provisions of the Act there is an agreement between the subscriber and the association; without being consulted, and without even his knowledge, the employee is made a party to such agreement; and further, the Act forces upon the employee in the event of injury, compensation provided for under the terms of the agreement as made between the subscriber and the association. If he does not accept the compensation prescribed under the terms of the Act, he has no remedy. He must either accept or reject compensation, all dependent upon the will and pleasure of the Industrial Accident Board. To concisely state it, the employees of subscribers are restricted and hampered in the exercise of their freedom of contract, are deprived of their liberty and their property without a voice in such proceedings, while on the other hand employees of non-subscribers either in other lines of business or in similar ones, have no such hindrances and barriers thrown about them. The individual, as in the instant case, or classes of individuals, as the case may be, is forbidden the right to acquire and enjoy property in the manner and form as granted to him by law, and the denial of this right is a deprivation of the individual of his liberty and of his freedom of contract. The right of an individual to con-

tract is sacred and is as well recognized as the right to property, and our Courts have universally protected this right to contract against any unlawful restrictions. The classification made by the provisions of this Act is an arbitrary one and all employees of subscribers are clearly restricted in their contractural rights because of such arbitrary classification when compared with employees whose employers are not included within the operation of the Act. Why the distinction? Is it natural and reasonable, or is it arbitrary and unreasonable? Is it based upon any real distinction that exists between the employees excluded and those included? There must be some basis for the classification, some sound reason to bring the same about, and the circumstances and situation must be such as that everyone who comes or is within such classification is subjected to the same disabilities, the same duties, the same burdens, and the same obligations, and the same privileges. In other words, all must suffer or benefit alike and there is no reason which is natural why the employees of subscribers should have burdens and obligations imposed on them which are not imposed upon employees of non-subscribers who are in the same class, condition and calling, for is there any reason why all should not share equally and alike the same benefits, the same privileges, the same burdens and liabilities? The employees of a subscriber should have the same right to contract as they see fit, which is given to employees of a non-subscriber, all of said employees being in a similar class and calling. No right afforded one should be denied the other. In the Act in question there is an inherent vice, and consequently, clear and unlawful restrictions upon the right of the employee to contract.

The Court of Iowa in the case of Hunter vs. Colfax Consolidated Coal Company, 154 N. W., 1037, 11 N. C. C. A. 886, on page 915 in the latter report, says:

"While the right to contract is a property right, like all other property rights, it is subservient to the public welfare, and may be taken by the State in a well-directed effort to promote the public welfare by the exercise of police power."

"While we recognize the rights therein stated, yet, at the same time it is a well recognized principle that such interference with contracting must not be arbitrary or unreasonable."

And the Court further stated on page 918:

"It may not be doubted that the exercise of the power must not be a mere pretense, and that its exercise is sanctioned only for uses properly within the scope of and the necessity for exercising the power."

The Court then refers to a number of cases in which the freedom of contract was abridged or interfered with, and states on page 919:

"In all of these cases was present a control of the right to contract without any election as to whether to submit to the statute regulation or not. Most, if not all, of them involve that the object of the whole act is not within the police power. The manifest distinction is that the Iowa Act leaves both employer and employee the liberty to accept or reject its provisions."

As the California Court in dissenting opinion by Judge Henshaw in the case of Western Indemnity Co. vs. Pillsbury, on page 45 of the reported case in 10 N. C. C. A., said:

"It is not the needy workman who is alone to be benefited by it. Every high-placed and high-salaried official in banks, mercantile house, or mine, is equally the recipient of this law's bounty. These men, one would say, of all men in the country, are best capable of looking out for their own interests, but this law says not. They are denied the right of contract, the right to waive the provisions of this law."

The language of that learned Judge is equally applicable to the statute in question, for it applies generally to all employees, and is not restricted necessarily to the industrial workmen for whose benefit the law was supposedly passed. All coming within this law are denied this right of contract, the right to waive the provisions of the law and to contract and agree as they see fit.

The Iowa Court in the Hunter case, supra, also said:

"If acceptance of the Act is elective, then the statute cannot work an impairment. Whenever liberty is left on whether to contract at all, then a new contract or a change in contract made by contract, cannot be objected to as an invalid impairment."

As was said by the Iowa Court:

"The rules for dealing with the fundamental law that are urged upon us present in effect an assertion that the judges of the present day may repeal the Constitution whenever in their opinion that instrument is out of harmony with the light of the twentieth century conditions and ideals. This is akin to the other theory that judges should create law whenever convinced that it is salutary and demanded by the people. The age of the Constitution and the enlightenment and progressiveness of the judge have not the slightest bearing upon whether a legislature has or has not made some particular thing into law. The age of the Constitution may develop conditions which make it desirable to amend it. Until amended, it is a holy covenant, which judges are not at liberty to emasculate by urging a species of statute of limitation. None but foresworn judges will yield in these to any degree of necessity, or pressure of public opinion, or disregard the Constitution because it was created in the eighteenth or nineteenth century. Those who insist most strongly that the Courts shall legislate or set aside the Constitution in a given way and case, will be the most

clamant in condemning any such action when it interferes with the law that they favor."

This Court held in Coppage vs. Kansas, 236 U. S., 1:

"Included in the right of personal liberty and the right of private property, partaking of the nature of each, is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense."

And also held as follows:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure." (Truax vs. Raich, 239 U. S., 33, 41.

In the case of Lochner vs. New York, supra, the Court held:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. Therefore, when the State by its legislature in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor, or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail, the right of

the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State. It must of course be conceded that there is a limit to the valid exercise of the police power by the State. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people. Such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext, become another and delusive name for the supreme sovereignty of the State to be exercised free from any constitutional restraint. It is a question of which of two powers or rights shall prevail, the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."

It is not every act which makes for the health, safety and morals of the people that can be held valid, for, as this Court held, "It is also urged that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract, is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions and conduct, properly so-called, as well as contract would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, law-

yers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme."

We are then face to face with the question: Does the law impose a reasonable regulation for the benefit of the people, reasonable as to the end to be obtained, reasonable as to the means adopted to obtain that end, or is it unjust and uncalled for? Does it, under the guise of regulation, impose an unjust and uncalled for restraint on liberty and on the freedom of contract?

The law in question clearly does not leave to the employee the right to contract as he sees fit, but forces him to enter into an agreement utterly without his consent, and which agreement may be utterly revolting to him and an infringement of his every right granted to him by the Fourteenth Amendment. If an employee is permitted to contract as he sees fit with reference to what his rights and liabilities shall be, then clearly no constitutional guarantee has been infringed, but when the Act forces him to enter into an agreement with his employer, utterly without his consent, is not this a taking away of that freedom of contract which has been so zealously guarded by the Constitution since the early days? Since this Act discriminates, in that, some are permitted to make contracts as they see fit, and others are denied this privilege, when all are in the same class, condition and calling, is not this an arbitrary infringement of the freedom of contract granted by the Constitution?

We therefore contend and earnestly believe that the Act in question is utterly subversive of the rights granted to this plaintiff by the fundamental law of the land, and being so, the Act in question is unconstitutional and void.

Wherefore, premises considered, the plaintiff in error,

Middleton, prays that the Act be declared unconstitutional and the cause be reversed and remanded to the lower Court for trial.

Respectfully submitted,

CHAS. B. BRAUN,

Attorney for Plaintiff in Error.

Employers Liability Act

Effective September 1, 1913.

283-913-25h

S. B. No. 11 Effective September 1, 1913

EMPLOYERS LIABILITY ACT—INDUSTRIAL ACCIDENT BOARD—"TEXAS EMPLOYERS INSURANCE ASSOCIATION," CREATED—POWERS OF COMMISSIONER.

An Act relating to employers' liability and providing for the compensation of certain employees, and their representatives and beneficiaries, for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof the more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the term of office of its members, and fixing also the powers, duties and liabilities of said insurance association and the extent of control over the same to be exercised by the Commissioner of Banking and Insurance, and providing also for the insurance of payments of compensation to employees by certain other insurance companies and organizations and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Part I.

Section 1. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employee, provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence where the violation by such employer of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

2. That the injury was caused by the negligence of a fellow employee.

3. That the employee had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury.

4. Provided, however, in all such actions against an employer who is not an (a) subscriber as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Sec. 2. The provisions of this Act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees.

Sec. 3. The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employers for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employees Insurance Association as the same is hereinafter provided for; provided, that all compensation allowed under the succeeding sections herein, shall be exempt from garnishment, attachment and all other suits or claims, as are current wages now exempted by law.

Sec. 4. Employees whose employers are not at the time of injury subscribers to said association, and the representatives and beneficiaries of deceased employees who at the time of injury were working for non-subscribing employees, cannot participate in the benefits of said Insurance Association, but they shall be entitled to bring suit, and may recover judgment against such employers, or any of them, for all damages sustained by reason of any personal injury received in the course of employment, or by reason of death, resulting from such injury, and the provisions of Section One of this Act shall be applied in all such actions.

Sec. 5. Nothing in this Act shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife and heirs or such of them as there may be of any deceased employee, whose death is occasioned by homicide, through the wilful act or omission or gross negligence of any person, firm or corporation, the employer of such employee at the time of the injury, causing the death of the latter, and in all cases where exemplary damages are sought under this section in case the injured party has already been awarded actual damages by the board herein provided, said fact and said amount so received shall be made known to the court or jury trying said cause for exemplary damages; and on the issue for exemplary damages he shall have the same defenses as under the existing law.

Sec. 6. No compensation shall be paid under this Act for an injury which does not incapacitate the employee for a period of at least one week from earning full wages, but if incapacity extends beyond one week, compensation shall begin on the eighth day after injury.

Sec. 7. During the first week of the injury the association shall furnish reasonable medical aid, hospital services and medicines when needed, and if it does not furnish these immediately as and when needed, it shall repay all sums reasonably paid or incurred for same; provided, reasonable notice of injury shall be given to the said association, and this provision requiring notice shall apply to all subsequent sections of this Act providing for compensation.

Sec. 8. If death should result from the injury, the association hereafter created, shall pay to the legal beneficiary of the deceased employee a weekly payment equal

to 60 per cent of his average weekly wages, but not more than $15.00 nor less than $5.00 a week, for a period of three hundred and sixty weeks from the date of injury; provided, that the compensation herein provided for shall be distributed according to the law providing for the distribution of other property of deceased.

Sec. 9. If the deceased employee leave no legal beneficiaries, or creditors, the association shall pay all expenses incident to his last sickness, and in addition a funeral benefit not to exceed one hundred dollars; provided, where the deceased leaves no beneficiaries as provided herein, but leaves creditors, the association shall be liable to such creditors, for an amount not exceeding the amount that would otherwise have been due beneficiaries, which amount paid shall not exceed amount due such creditor or creditors.

Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a compensation equal to 60 per cent of his average weekly wages, but not more than fifteen dollars, nor less than five dollars a week, and in no case shall the period covered by such compensation be greater than four hundred weeks.

Sec. 11. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to 60 per cent of the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter, but in no case to be more than $15.00 a week; and the period covered by such compensation to be in no case greater than three hundred weeks.

Sec. 12. In case of the following specified injuries the amounts hereinafter named shall be paid by the association in addition to all other compensation: (a) For the loss by severance of both hands at or above the wrist, or of both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of the normal vision in both eyes, 60 per cent of the average weekly wages of the injured employee, but not more than $15.00 nor less than $5.00 a week for a period of one hundred weeks; (b) For the loss by severance of either hand at or above the wrist, or either foot above the ankle, or the reduction to one-tenth of normal vision in either eye, 60 per cent of the average weekly wages of the injured em-

ployee, but not more than $15.00 nor less than $5.00 a week for a period of fifty weeks; (c) For the loss by severance at or above the second joint of two or more fingers, including thumbs and toes, 60 per cent of the average weekly wages of the injured employee, but not more than $15.00 nor less than $5.00 a week, for a period of twenty-five weeks; (d) For the loss by severance of at least one joint of a finger, thumb or toe, 60 per cent of the average weekly wages of the injured employee, but not more than $15.00 nor less than $5.00 a week, for a period of twelve weeks.

Sec. 13. If an injured employee is mentally incompetent or is a minor at the time when any rights or privileges accrue to him, under this Act, his guardian or next friend may in his behalf claim and exercise such rights and privileges.

Sec. 14. No agreement by an employee to waive his rights to compensation under this Act shall be valid.

Sec. 15. In cases where death or total permanent disability results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the "Industrial Accident Board" hereinafter created.

Sec. 16. In all cases of injury resulting in death where such injury was received in the course of employment, cause of action shall survive.

Part II.

Section 1. There shall be an "Industrial Accident Board" consisting of three members, and the same is hereby created, to be appointed by the Governor, one of whom shall be designated as Chairman, and the term of office shall be two years for members of the board.

Sec. 2. One member of the Industrial Accident Board shall be at the time of its appointment, an employer of labor in some industry or business covered by this Act; one shall be at the time of his appointment a wage earner employed in some industry or business covered by this Act, and the third member shall be, at the time of his appointment a practicing attorney of recognized ability, said member to act in the capacity of legal adviser to the board in addition to his other duties as a member thereof.

Sec. 3. The salaries and expenses of the Industrial Accident Board shall be paid by the State. The salary of

the Chairman shall be three thousand dollars a year, and the salaries of the other members of the board shall be two thousand and five hundred dollars a year each. The board may appoint a secretary at a salary of not more than two thousand dollars a year and may remove him at any time, furnishing him, upon demand with a statement of the cause of his removal. It shall also be allowed an annual sum not exceeding five thousand a year, for clerical services, traveling and other necessary expenses. The board shall be provided suitable offices in the capitol or some other convenient building in the city of Austin, where its records shall be kept.

Sec. 4. The board may make rules not incinsistent with this Act, for carrying out and enforcing its provisions, and may require any employee claiming to have sustained injury to submit himself for examination before such board or some one acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board, to a physician or physicians, authorized to practice under the laws of this State. If the employee requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended, no compensation shall be payable in respect of the period of suspension. Process and procedure shall be as summary as may be under this Act. The board or any member thereof shall have power to subpoena witnesses, administer oaths, inquire into matters of fact, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. All rulings or decisions of the board relating to disputed claims shall be based upon questions of fact, and in accord with the provisions of this Act.

Sec. 4-a. No proceedings for compensation for injury under this Act shall be maintained unless a notice of the injury shall have been given to the association or subscriber, as soon as practicable after the happening thereof and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental inca-

pacity, within six months after death or the removal of such physical or mental incapacity.

Sec. 5. All questions arising under this Act if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board on any disputed claim may sue on such claim or may require suit to be brought thereon in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim; provided, however, that whenever any such suit is brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this Act, and the suit of the injured employee or persons suing on account of the death of such employee, shall be against the association, if the employer of such injured or deceased employee is at the time of such injury or death a subscriber, as defined in this Act, in which case the recovery shall not exceed the maximum compensation allowed under the provisions of this Act, and the court shall determine the issues in such cause instead of said board.

Sec. 6. If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work was executed by employees immediately employed by the subscriber, be liable to pay compensation under this Act to such employees, the association shall pay to such employees any compensation which would be payable to them under this Act if the independent or sub-contractors were subscribers. The association shall, however, be entitled to recover indemnity from any other persons who would have been liable to such employees independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employees, or in its own name and for its own benefit the liability of such other persons. This section shall not apply to independent or sub-contractors on any contract which is merely auxiliary and incidental to, and is not part of or process in, the trade or business carried on by the subscriber.

Sec. 7. Every employer shall hereafter keep a record

of all injuries, fatal or otherwise received by his employees in the course of their employment. Within eight days after the occurrence of an accident resulting in a personal injury to an employee, a report thereof shall be made in writing to the Industrial Accident Board on blank to be procured from the board for that purpose. Upon the termination of the disability of the injured employee, or if such disability extends beyond a period of sixty days the employer shall make a supplemental report upon blanks to be procured for that purpose. The said report shall contain the name and nature of the business, of the employer, the location of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of the accident, and the nature and cause of injury, and such other information as the board may require. Any employer failing or refusing to make any such report within the time herein provided, or failing or refusing to give to said board any information demanded by said board relating to any injury to an employee which information is in the possession of, or could have been ascertained by the employer by the use of reasonable diligence shall be liable for and shall pay to the State of Texas a penalty of not more than one thousand ($1,000.00) dollars for each and every offense, the same to be recovered in a suit to be instituted and prosecuted by the Attorney General, or under his direction, either in the District Court of Travis County, or in the county in which any defendant resides at the option of the said Attorney General.

Part III.

Section 1. The "Texas Employers' Insurance Association" is hereby created a body corporate with the powers provided in this Act and with all the general corporate powers incident thereto.

Sec. 2. The Governor shall appoint a board of directors of the association consisting of twelve members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such a time and for such term as the by-laws shall provide.

Sec. 3. Until the first meeting of the subscribers, the board of directors shall have and exercise all of the powers of the subscribers, and may adopt by-laws not incon-

sistent with the provisions of this Act, which shall be in effect until amended or repealed by the subscribers.

Sec. 4. The board of directors shall annually choose by ballot a president who shall be a member of the board, a secretary, a treasurer and such other officers as the by-laws may provide.

Sec. 5. Seven or more of the directors shall constitute a quorum for the transaction of business. Vacancies in any office may be filled in such manner as the by-laws shall provide.

Sec. 6. Any employer of labor in the State may become a subscriber excepting as provided in Part I, Section 2, of this Act.

Sec. 7. The board of directors shall, within thirty days of the subscription of twenty-five employers call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his residence or place of business not less than ten days before the date fixed for the meeting.

Sec. 8. In any meeting of the subscribers, each subscriber shall have one vote, and if a subscriber has five hundred employees to whom the association is bound to pay compensation, he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employees to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right, or by right of proxy, more than ten votes.

Sec. 9. No policy shall be issuel by the association until not less than fifty employers have subscribed; who have not less than two thousand employers (employees) to whom the association may be bound to pay compensation.

Sec. 10. No policy shall be issued by the association until a list of the subscribers with the number of employees of each, together with such other information as the Commissioner of Banking and Insurance may require, shall have been filed with the Department of Banking and Insurance nor until the President and Secretary of the Association shall have certified under oath that every subscription on the list so filed is genuine and made with an agreement with every subscriber that he will take the policies so subscribed for by him within thirty days of the

granting of a license to the association by the Commissioner of Banking and Insurance to issue policies.

Sec. 11. If the number of subscribers falls below fifty, or the number of employees to whom the association may be bound to pay compensation falls below two thousand, no further policies shall be issued until other employers have subscribed, who, together with existing subscribers amount to not less than fifty, who have not less than two thousand employees to whom the association may be bound to pay compensation, said subscription to be subject to the provisions of the preceding section.

Sec. 12. Upon the filing of the certificates provided for in the two preceding sections, the Commissioner of Banking and Insurance shall make such investigations as he may deem proper and if his findings warrant it, grant a license to the association to issue policies.

Sec. 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of hazard incident thereto. Subscribers within each group shall annually pay in cash such premiums as may be required to pay the compensation herein provided for the inquiries (injuries) which may occur in that year.

Sec. 14. The association may in its by-laws and policies fix the mutual contingent liability of the subscribers for the payment of losses and expenses not provided for by its cash fund, but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

Sec. 15. If the association is not possessed of cash funds above its insured premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability. Every subscriber shall pay his proportional part of any assessment which may be levied by the association, in accordance with the laws and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

Sec. 16. The board of directors may from time to time, by vote fix the amount to be paid as dividends upon the policies expiring during each year after retaining sums sufficient to pay all compensations, which may be payable on account of injuries sustained and expenses incurred.

All premiums, assessments and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of such group, but all the funds of the association and the contingent liability of all of the subscribers shall be available for the payment of any approved claim for compensation against the association.

Sec. 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the Commissioner of Banking and Insurance and shall not take effect until approved by him after such investigation as he may deem proper and necessary.

Sec. 18. This board of directors shall make and enforce reasonable rules for the prevention of injuries on the premises of subscribers, and for this purpose the inspector of the association shall have free access to all such premises during regular working hours. Any subscriber aggrieved by such rule or regulation may petition the Industrial Accident Board for a review, and it may affirm, amend or annul the rule or regulation.

Sec. 19. Every subscriber shall, as soon as he secures a policy, give notice in writing or print, to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the association.

Sec. 20. Every subscriber shall, after receiving a policy, give notice in writing or print, to all persons with whom he is about to enter into a contract of hire, that he has provided for payment of compensation for injuries by the association. If any employer ceases to be a subscriber, he shall on or before the day on which his policy expires, give notice to that effect in writing or print to all persons under contract of hire with him. In case of the renewal of his policy, no notice shall be required under this Act. He shall file a copy of said notice with the Industrial Accident Board.

Sec. 21. If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay any employee any damages, on account of any personal injury sustained by such employee during the period of subscription, the association shall pay to the subscriber the full amount of the judgment and the cost assessed therewith if the subscriber shall have given the association notice of the bringing of the action upon which the judgment

was recovered, and an opportunity to appear and defend same.

Sec. 22. The corporate powers of the association shall not expire because of failure to issue policies or make insurance.

Sec. 23. The board of directors appointed by the Governor under the provisions of Part III, Section 2 of this Act, may incur such expenses in the performance of its duties, as may be approved by the Governor. Such expenses shall be paid by the State out of any funds not otherwise appropriated, not to exceed five thousand dollars.

Part IV.

Section 1. The following words and phrases, as used in this Act, shall, unless a different meaning is plainly required by the context, have the following meaning: "Employer," shall include the legal representatives of any original employer. "Employee' shall include every person in the service of another under any contract of hire, expressed or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of the employer. Any reference to any employee who has been injured shall when the employee is dead, also include the legal beneficiaries of such employee to whom compensation may be payable. "Average Weekly Wages" shall mean the earning of the injured employee during the period of twelve calendar months, immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks during such period, then the earnings for the remainder of the twelve calendar months shall be divided by the number of weeks remaining after the last (lost) has been deducted. When, by reason of the shortness of the time of the employment of the employee, it is impracticable to compute the average weekly wages as above defined, it shall be computed by the Industrial Accident Board in any manner which may seem just and fair to both parties. "Association" shall mean the "Texas Employees Insurance Association," or any other insurance company authorized under this Act to insure the payment of compensation to injured employees, or to the beneficiaries of deceased employees. "Subscriber" shall mean any employer who has become a member of the association by paying a year's premium

in advance and receiving the receipt of the association therefor; provided, that the association holds a license issued by the Commissioner of Banking and Insurance as provided for in Part III, Section 12 of this Act.

Sec. 2. Any insurance company, which term shall include mutual and reciprocal insurance companies lawfully transacting a liability or accident business within this State, shall have the same right to insure the liability to pay the compensation provided for by Part I of this Act, and when such company issues a policy conditioned to pay such compensation, the holder of such policy shall be regarded as a subscriber so far as applicable under this Act; and when such company insures such payment of compensation it shall be subject to the provisions of Parts I, II and IV and of Sections 10, 17 and 21 of Part III of this Act, and shall file with the Commissioner of Banking and Insurance, its classification of premiums none of which shall take effect until the Commissioner of Banking and Insurance has approved same as adequate to the risks to which they respectively apply and not greater than charged by the association, and such company may have and exercise all of the rights and powers conferred by this Act on the association created hereby but such rights and powers shall not be exercised by a mutual or reciprocal organization unless such organization has at least fifty subscribers who have not less than two thousand employees.

Sec. 3. Any subscriber who has paid his annual premium as provided in Section 1, Part IV of this Act, but who ceases to be an employer after three months and before the expiration of one year, may by satisfactory proof of such fact made to the Industrial Accident Board as herein created, be entitled to a refund of such portion of the annual premium so paid by him as the portion of the year in which he is not an employer bears to the whole year; provided, that in no event shall more than three-fourths of the annual premium by any subscriber who claims the benefit of this refund, ever be refunded.

Sec. 4. Should any part of this Act be, for any reason held to be invalid, or inoperative, no other part or parts shall be affected thereby, and if any exception to or limitation upon any general provision herein contained shall be held to be unconstitutional or invalid or ineffective the general provision shall nevertheless stand effective

and valid as if it had been enacted without exception or limitation.

Sec. 5. All laws or parts of laws in conflict herewith are hereby repealed.

Sec. 6. This Act shall take effect and be in force on and after the first day of September, Nineteen Hundred and Thirteen.

Sec. 7. There now being no adequate law on the statutes to protect the rights of industrial employees who may be injured in industrial accidents and the beneficiaries of such employees who may be killed in such accidents, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

Approved April 16, 1913.

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted]102

CHARLIE MIDDLETON,

Plaintiff in Error,

v.

TEXAS POWER & LIGHT COMPANY,

Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

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ALEXANDER POPE,
Attorneys for Defendant in Error.

R. DUNIGAN & SON, Printers, Austin.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 368

CHARLIE MIDDLETON,

Plaintiff in Error,

v.

TEXAS POWER & LIGHT COMPANY,

Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Texas Employers' Liability Act became effective September 1, 1913 (Brief, plaintiff in error, p. 37).

Plaintiff in error alleged that he was injured December 6, 1913, while in the employment of defendant in error (Transcript of Record, p. 2).

At the date of the receipt of the injury, defendant in error

was a "subscriber" as defined in Section 1, Part IV, of the Act (Brief, plaintiff in error, p. 48).

Section 3, Part I, of the Act, provides: "The employees of a subscriber shall have no right of action against their employer for damages for personal injury and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employers for damages for injuries resulting in death but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employers' Insurance Association as the same is hereinafter provided for; provided that all compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment and all other suits or claims as are current wages now exempted by law" (Plaintiff in error's brief, p. 38).

Sections 1 and 2, Part IV, of the Act, provide: (1) Association shall mean the "Texas Employers' Insurance Association" or any other insurance company authorized under this Act to insure the payment of compensation to injured employees or to beneficiaries of deceased employees. "Subscriber" shall mean any employer who has become a member of the Association by paying a year's premium in advance and receiving the receipt of the Association therefor; provided that the Association holds a license issued by the Commissioner of Banking and Insurance as provided for in Part III, Section 12, of this Act. (2) Section 2. Any insurance company, which term shall include mutual and reciprocal insurance companies lawfully transacting a liability or accident business within this State, shall have the same right to insure the liability to pay the compensation provided for by Part I of this Act and when such company issues a policy conditioned to pay such compensation, the holder of such policy shall be regarded as a "subscriber" so far as applicable under this Act" (Plaintiff in error's brief, pp. 48-49).

Section 19, Part III, of the Act, provides: "Every subscriber shall, as soon as he secures a policy, give notice in writing or print to all persons under contract of hire with him that he has provided for payment of compensation for injuries with the Association" (Plaintiff in error's brief, p. 47).

Section 20, part III, of the Act, provides: "Every subscriber shall, after receiving a policy, give notice in writing or print to all persons with whom he is about to enter into a contract of hire, that he has provided for payment of compensation for injuries by the Association" (Plaintiff in error's brief, p. 47).

Plaintiff in error, refusing to accept the compensation provided for by the Act and ignoring the same, upon Dec. 23rd, 1913, filed this suit at law for damages on account of alleged injuries suffered by him, grounding his action upon an alleged breach of the common law duties of a master to his servant (Transcript of Record, pp. 1-3).

In answer to said suit, defendant in error, amongst others, filed its plea in abatement, as follows:

"And the said defendant by its attorney comes and says that this Court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff, because it says:

"That at the time of the accident to the plaintiff as alleged in his original petition the said plaintiff was an employee of this defendant and in its service under contract of hire; that the said plaintiff at the time of said accident was neither a domestic servant nor farm laborer, nor an employee of any person, firm or corporation operating any railroad as a common carrier; nor was he engaged in working for a cotton gin.

"That at the time of said accident, and at the time of the filing of plaintiff's petition herein, and now, this defendant was an employer of labor in the State of Texas; and then and

now had and has in its employment more than five employees; and that at said several times and now it was and is the holder of a policy of liability and compensation insurance issued in its favor by the Aetna Life Insurance Company of Hartford, Conn., having paid a year's premium in advance and received a receipt therefor, which insurance company at said several times and now was and is lawfully transacting a liability and compensation insurance business in the State of Texas, with a permit to do business as is provided for by law and a license, as is provided for by the Act of the Thirty-third Legislature, Chapter 179, authorizing the organization of the "Texas Employers' Insurance Association; said policy being conditioned to pay the compensation provided for by the Texas Workmen's Compensation Act (Chapter 179 of the Acts of the Thirty-third Legislature), of which fact the said plaintiff herein was given and had notice in writing and print as soon as said policy was secured, and notice of the fact that it had provided for the payment of compensation for injuries by said Insurance Company as provided for by said Texas Workmen's Compensation Act was given to said plaintiff in writing and print.

"That no claim for compensation as provided for in said Act with respect to the injury alleged to have been suffered by the said plaintiff has been made by said plaintiff or any one acting for him either to this defendant or to said Insurance Company. On the contrary, the said plaintiff by and through his attorney has refused to receive the compensation with respect to his alleged injury provided for by said Act; and has refused to recognize said Act.

"Defendant further says that no question arising under said Act has been referred to or determined by the Industrial Accident Board as required by the provisions of the Texas Workmen's Compensation Act.

"Defendant further says that the said Aetna Life Insurance

Company has a local agent in the State of Texas, to-wit: E. W. Marshall & Company, who reside in the County of McLennan in said State of Texas and all of these matters the said defendant is ready to verify.

"Wherefore, the premises considered, the said defendant prays judgment whether this Court can or will take any further cognizance of the action of the said plaintiff aforesaid; that said action aforesaid of the said plaintiff be dismissed and that this defendant go hence without day and recover of the plaintiff all its costs in this behalf expended" (Transcript of Record, pp. 7-9).

To said plea in abatement plaintiff in error, by way of replication, specially demurred, setting up in said special demurrers amongst other things that said Texas Employers' Liability Act was in violation of the Fourteenth Amendment of the Federal Constitution (Transcript of Record, pp. 4-5).

By said demurrers, plaintiff in error admitted the truth of the several matters set up by defendant in error in its plea in abatement; and in addition thereto, as appears from the judgment of the Trial Court in the case "waived any proof in support of said plea in abatement and agreed that the facts therein stated were true" (Judgment of the Trial Court, pp. 9-10, Transcript of Record).

To the contentions of plaintiff in error, defendant in error makes the following answer:

The Texas Employers' Liability Act is not violative of any provision of the Fourteenth Amendment to the Constitution of the United States, because:

I.

The Act is not compulsory as to the employees of a "subscriber."

II.

The Act does not deprive the employees of a "Subscriber" of liberty or property without due process of law.

III.

The Act is not discriminatory and does not deny to persons within the State's jurisdiction the equal protection of the laws.

IV.

The Act does not deprive the employees of a "subscriber" of the right of freedom of contract.

V.

The classification made by the Act as to the persons embraced by it, or as to those excluded from its provisions, is not unreasonable nor arbitrary.

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N. Y. C. R. Co. v. White, 243 U. S. 188.

Mountain Timber Co. v. State of Washington, 243 U. S. 219.

Hawkins v. Bleakly, 243 U. S. 210.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.

California.

Western Indemnity Co. v. Pillsbury, 151 Pac. 398.

Western Metal Supply Co. v. Pillsbury, 156 Pac. 461.

Western Indemnity Co. v. Ind. Acc. Comm., 163 Pac. 60.

Northern Pac. S. S. Co. v. Ind. Acc. Com., 163 Pac. 199-910.

Illinois.

Strom v. Postal Telegraph Cable Co., 111 N. E. 555.

Deibikis v. Link Bolt Co., 104 N. E. 211.

Victor Chemical Works v. Ind. Board, 113 N. E. 173.

Parker-Washington Co. v. Ind. Board, 113 N. E. 976.

Chicago Rys. Co. v. Ind. Board, 114 N. E. 534; 276 Ill. 112.

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Hovis v. Cudahy Refg. Co., 148 Pac. 626.

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Lindstrom v. The Mutual S. S. Co., 156 N. W. 669.

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Lewis & Clark Co. v. Ind. Acc. Board, 155 Pac. 268.

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Wheeler v. Contoocook Mills Corp., 94 Atl. 265.

New Jersey.

Sexton v. Newark Dist. Tel. Co., 91 Atl. 1070.

Hyett v. Penna. Ry. Co., 92 Atl. 58.

Brost v. Whitall-Tatum Co., 99 Atl. 315.

Troth v. Millville Bottle Works, 98 Atl. 435.

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Jeffrey Mfg. Co. v. Blagg, 108 N. E. 465.

Porter v. Hopkins, 109 N. E. 629.

Fassig v. State, 116 N. E. 104.

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Adams v. Iten Biscuit Co., 162 Pac. 938.

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Evanhoff v. State Ind. Acc. Comm., 154 Pac. 106.

Pennsylvania.

Anderson v. Carnegie Steel Co., 99 Atl. 215.

Rhode Island.

Sayles v. Foley, 96 Atl. 340.

Texas.

Middleton v. Texas Power & Light Co. (Sup. Ct.), 185 S. W. 556.

Consumer's Lignite Co. v. Grant, 181 S. W. 202.

Postex Cotton Mill Co. v. McCamy, 184 S. W. 569.

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El Paso Sash and Door Co. v. Carraway, 186 S. W. 363.

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State Ex. Rel. Davis-Smith Co. v. Clausen, 177 Pac. 1101.

State v. City of Seattle, 132 Pac. 45.

State v. Mountain Timber Co., 135 Pac. 645.

Stertz v. Ind. Ins. Comm., 158 Pac. 256.

State Ex. Rel. Fletcher v. Carroll, 162 Pac. 593.

Northern Pac. Ry. Co. v. Meese, 239 U. S. 614.

Stoll v. Pacific Coast S. S. Co., 205 Fed. 169.

Raymond v. C. M. & St. P. Ry. Co., 233 Fed. 239.

West Virginia.

DeFrancesco v. Piney Mining Co., 86 S. E. 777.

Watts v. Ohio Valley Elec. Ry. Co., 88 S. E. 659.

Rhodes v. J. B. B. Coal Co., 90 S. E. 796.

Wisconsin.

Borgnis v. Falk Co., 133 N. W. 209.

ARGUMENT.

UNDER POINT I.

Plaintiff in error, by his demurrers and by his agreement entered into in open Court, having conceded that at the time of the receipt of his alleged injury he was in the employment of defendant in error; that at said time the latter was a "subscriber" under the terms of the Texas Employers' Liability Act; and that at said time he had been given notice in writing and in print as soon as the policy had been secured, that his employer, the defendant in error, had provided for the payment of compensation for injuries by the Aetna Life Insurance Company of Hartford, Conn., in accordance with the provisions of the Act, it is a clear proposition that the operaof the Act was not compulsory in so far as he was concerned.

Upon this point the Supreme Court of Texas, Chief Justice Phillips being the organ of the Court (Transcript of Record, pp. 47-49), said:

"As to employees this is the effect of the Act:

"(1) They are at liberty to work or not to work for employers who are or who may become subscribers under the Act.

"(2) If they enter the service of a subscribing employer or remain in his service after written or printed notice given by him that he is such an employer and are injured in the course of their employment, a stated compensation based upon their average wages is paid them therefor, or to their representatives or beneficiaries in the event of death from the injury, without regard to whether the employer is liable therefor as at common law, and therefore without the necessity of proving negligence, through an agency provided by the Act as the means of insuring such payment.

"(3) Such employees as are injured in the service of subscribing employers who comply with the Act are denied all right of action therefor against such employer, as are repre-

sentatives and beneficiaries of deceased employees for injuries resulting in death except that the surviving husband or wife or heirs of any such deceased employee killed either through the wilful act or omission or gross negligence of such employer may maintain an action for exemplary damages on account of his death." * * * "The effect of the Act upon the rights of employees cannot be properly weighed or determined without a due consideration of its aim and policy in their interest. Its theory, as it concerns them, is that the plan of compensation it provides for their injuries suffered in the course of their employment is more advantageous than a suit for damages. In the latter. the employee is compelled to assume the burden of establishing that his injury was caused by his employer's negligence, or the negligence of a servant for which the employer is responsible. His suit fails if it is subject to any of the common law defenses, that is, if his own negligence was the proximate cause of the injury, or if the injury was due to a risk he assumed, or to the negligence of a fellow servant. By the Act a fixed compensation is payable to him upon the mere happening of any injury in the course of the employment or to his beneficiaries in the event of his death from the injury, without reference to any negligence on the part of the employer or his servants, and without regard to defenses available to the employer at common law.

"With this as the evident spirit and design of the Act in the employees interest, his entering the service of an employer who, in his business pursuit is governed by the Act, or his remaining after notice duly given in the service of an employer who has adopted its plan of compensation and become subject to it, is made to operate as a waiver of any cause of action against the employer on account of any injury suffered in the course of the employment except for exemplary damages in behalf of the surviving husband, wife or heirs as already noted."

In the following twenty-six states and two territories, their

respective workmen's compensation laws are elective as to both employer and employee: Colorado, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, West Virginia, Wisconsin, Alaska, and Porto Rico.

The method of election by the employee provided in the several Acts is as follows:

Colorado: If employee has notice of employer's acceptance, he is likewise deemed to have accepted in the absence of written notice to the contrary at the time of hiring or within seven days after notice of employer's acceptance; Chapter 179, Laws 1915, as amended by Chapter 155, Laws of 1917, supplemented by Chapters 180, 181 Laws of 1915.

Connecticut: As to employers who regularly employ five or more employees, acceptance of Act by both parties conclusively presumed in the absence of written stipulation to contrary in contract of hire or written or printed notice from either party to other and Commissioner. Employers who regularly employ less than five may accept by giving written or printed notice to employee and Commissioner and presenting evidence of full insurance. In case of such acceptance, employee is likewise deemed to have accepted. Chapter 138, Laws 1913, as amended by Chapter 288 Laws 1915, and Chapter 368 Laws 1917, supplemented by Chapter 287 Laws of 1915 and Chapters 37, 116 and 126 Laws 1917.

Delaware: Employees acceptance presumed in absence of written notice to employer at time of hiring or thirty days prior to accident with copy to Board. Article 5, Chapter 50, Revised Code State of Delaware, Workmen's Compensation Law of 1917 (Chapter 233, Laws 1917).

Indiana: Employees acceptance presumed in absence of written notice to employer at time of hiring or thirty days

prior to accident with copy to Board, Chapter 106, Laws 1915, entitled "The Indiana Workmen's Compensation Act," as amended by Chapters 63, 81, 165, Laws 1917, supplemented by Chapter 99, Laws 1917.

Iowa: Acceptance of employee presumed unless and until written notice of election to reject in form prescribed served upon employer and Commissioner. Chapter 8-A, Title XII of Iowa Code, 1913 (Supplement Chapter 147, Laws of 1913, as amended by Chapters 188, 270, 336, 409 and 418, Laws of 1917) (Supplemented by Chapter 67, Laws 1917).

Kansas: Acceptance of employee presumed unless written declaration to the contrary filed with Secretary of State and employer before injured. Chapter 61, Art. 6, Kansas General Statutes of 1915, entitled "Workmen's Compensation Act (Chapter 218, Laws of 1911, as amended by Chapter 216, Laws of 1913) as amended by Chapter 226, Laws 1917.

Kentucky: Employee elects by signing prescribed form of notice to be filed with employer, Chapter 33, Laws 1916.

Louisiana: Election by employer and employee presumed in absence of written notice from either party to other at least thirty days prior to the accident. Act No. 20, Acts 1914, entitled "Burke-Roberts Employers' Liability Act," as amended by Act. No. 243, Acts of 1916.

Maine: If employer has elected, employee's acceptance presumed in absence of written notice to contrary at time of hiring and within ten days after employer's election, copy of such notice to be filed with Commission within ten days thereafter. Chapter 295, Act of 1915, entitled Workmen's Compensation Act, supplemented by Chapters 224, 230 and 241, Acts of 1917.

Massachusetts: Election of employee presumed if employer has elected unless written notice to the contrary be given employer at time of hiring or within thirty days after employers notice of subscribing or insuring. Chapter 751, Acts 1911, as

amended by Chapters 172, 571, Acts 1912. Chapters 445, 458, 568, 696, 746, Acts of 1913. Chapters 338, 408, Acts 1914. Chapters 123, 275, 314, Acts 1915. Chapters 72 and 90, Acts 1916. Chapters 198, 249, 269, 297, Acts 1917.

Michigan: Employee's acceptance presumed where employer has accepted unless written notice of contrary election be given employer at time of hiring or within thirty days after election. Act No. 1022, Acts of 1912 (Extra session) Amended by Acts No. 50, 79, 156, 259, 388, Acts of 1913; Acts Nos. 104, 153, 170, 171, Acts of 1915; and Acts Nos. 41, 206, 235, 249, Acts 1917. Supplemented by Act No. 12, Acts of 1912; 136, 137, and 155 Acts of 1915; and Act No. 201, Acts of 1917.

Minnesota: Election of employee presumed in absence of notice to the contrary given to employer and duplicate filed with Commissioner. General Statutes 1913, Chapter 84a, entitled Workmen's Compensation (Chapter 467, Laws 1913,) as amended by Chapters 193 and 209, Laws 1915, and Chapters 302, 351, Laws 1917, supplemented by General Statutes of 1913, Sections 3439, 3458 (Chapter 122, Laws 1913; as amended by Chapter 65, Laws 1915; and Chapter 201, Laws 1917).

Montana: Acceptance of employee presumed in absence of written notice to contrary in prescribed form served upon employer and copy with proof of service filed with Board. Chapter 96, Laws of 1915.

Nebraska: Election of employee presumed unless notice of contrary election given employer and duplicate with affidavit of service filed with Commissioner. 1913 Revised Statutes, Art. VIII, Chapter 35 (Chapter 198, Laws 1913, entitled Workmen's Compensation Law of 1913).

Nevada: Employee's acceptance conclusively presumed in absence of notice of rejection substantially in prescribed form served on employer with affidavit of service filed with

Commissioner. Chapter 111, Laws 1913, as amended by Chapter 190, Laws 1915, and Chapter 233, Laws of 1917.

New Hampshire: Employee elects by accepting or claiming compensation under Act of injury. Chapter 163, Law 1911, supplemented by Chapter 170, Laws 1915.

New Jersey: Employees acceptance presumed in absence of written notice to employer or express statement to contrary in contract. Chapter 95, Laws 1911, as amended by Chapter 174, Laws 1913, Chapter 244, Laws 1914.

New Mexico: Acceptance of Act presumed as to employer and employee in absence of written notice to contrary from either party to other in contract of hire or at any time prior to accident. Chapter 83, Laws 1913, entitled "Workmen's Compensation Act."

Oregon: Acceptance of Act presumed on part of employee unless notice of contrary election given employer at time of hiring or in case of employer's recall of rejection of Act at any time before such recall becomes effective. Chapter 112, Law 1913, as amended by Chapter 271, Laws 1915, and Chapter 288, Laws 1917.

Pennsylvania: Employer and employee conclusively presumed to have accepted Act in absence of written notice from either party to other on or before December 31, 1915, or at time of hiring and copy of such notice with proof of service filed with Bureau within ten days after service and before accident has occurred. Act No. 338, Acts 1915, supplemented by Act. No. 339, Act 1915 (as amended by Act No. 57, Acts 1917).

Rhode Island: Acceptance of employee presumed if employer has accepted in absence of written notice to contrary given to employer at time of hiring or within ten days after notice of employer's election and duplicate filed with Commissioner within ten days thereafter. Chapter 831, Laws 1912,

entitled "Workmen's Compensation Act" as amended by Chapters 936 and 937, Laws 1913; Chapter 1268, Laws 1915; Chapter 1534, Laws 1917.

South Dakota: Acceptance of employee presumed in absence of written notice to employer at time of hiring or thirty days prior to accident with copy to Commissioner. Chapter 376, Laws 1917, entitled "South Dakota Workmen's Compensation Law."

Texas: Act of 1913: Mode of election by employee not designated, but as Act construed by Supreme Court in Middleton v. Texas Power & Light Company, supra, employee's entering service of subscriber employer, or remaining in such service after notice operates as a waiver of any cause of action against employer on account of any injury suffered in course of employment except for exemplary damages in behalf of surviving wife, husband or heirs. Acts of 1917: Acceptance of employee presumed in absence of written notice to contrary at time of hiring or within five days after notice of employer's acceptance. Chapter 103, Laws 1917.

Vermont: Acceptance of Act by employer and employee presumed in absence of written notice to contrary from either party to other and to Commissioner of Industries prior to accident or in case of contract of hiring made after July 1, 1915, at time of hiring. Chapter 164, Acts 1915, Vermont's Workmens' Compensation Act as amended by Chapters 171, 173, and 175, Acts of 1917.

West Virginia: Employee deemed to have elected if he remains in service of employer after notice of latter's election. Chapter 10, Laws 1915, Regular Session and Chapter 1, Laws 1915, Extraordinary Session.

Wisconsin: If employer subject to Act, election of employee presumed in absence of written notice to contrary. Statutes 1915, Chapter 110a. (Chapter 50, Laws 1911, as amended by Chapter 664, Laws 1911, Chapters 559, 707, 772

and 773, Laws 1913; Chapters 121, 241, 316, 369, 378, 462, 582, and 604, Laws 1915, and Chapter 624, Laws 1917.

Alaska: Employee's acceptance is conclusively presumed in absence of written notice to contrary served on employer and recorded with United States Commissioner accompanied with proof of service. Chapter 71, Laws 1915, as amended by Chapter 44, Laws 1917.

Porto Rico: Employee's election presumed if employer has posted notice of his acceptance but employee may reject at any time before injury by serving written notice on employer and filing same with Commissioner with affidavit showing date of serving notice on employer. Act No. 19, Acts of 1916, as amended by Acts of 1917.

Chief Justice Phillips' holding, therefore, that under the Texas Act of 1913 the employee's voluntary entering the service of an employer who is a "subscriber" under the Act, or his voluntarily remaining in such service after notice duly given by his employer who has adopted its plan of compensation and become subject to it, operates as an election on the part of said employee to accept the provisions of the Act, not only rests in sound reason, but the principle announced has been enacted into law by express provision of the statutes of twenty-six states and two territories of the Union.

True in this matter of election the initiative is given to the employer. While every employer having in his employ more than five employees, and the employees of such employer, except domestic servants, farm laborers and employees of any person, firm or corporation operating any railway as a common carrier and laborers engaged in working for a cotton gin, are embraced, yet the Act does not become effective as to such employer nor as to his employees except and until the employer takes the affirmative step of becoming a "subscriber" to the Texas Employers' Insurance Association by paying a year's premium in advance and receiving his receipt therefor, or

becomes the holder of a policy of insurance in an insurance company writing compensation insurance. Likewise, under express provision of the Act (Section 20, Part III) the employer may withdraw himself, and his employees, from the operation of the Act by ceasing at any time to be a member of the Association or ceasing to be a holder of said policy of insurance. The Act becomes operative, or ceases to operate under its express terms upon the volition of the employer. It is manifest that the employee cannot be heard to complain of this when we consider that from the pocket of the employer comes the money with which the compensation to the employee is paid; and that it is by virtue of the foregoing provisions of the Act that the State obtains this money through voluntary action on the part of the employer by making it to his interest to come under the provisions of the Act. The constitutionality of this feature of the Act was bitterly assailed in Middleton v. Texas Power & Light Company, but was sustained by the Supreme Court (185 S. W. 557) overruling the Austin Court of Appeals, which had held contrary-wise. The Supreme Court adopted the viewpoint of the defendant in error in the case which was this (quoting from its brief): "Upon a careful consideration of the entire scheme proposed by the Act it is at once apparent that the provision giving the employer an election to become a member of the Associatio was for the purpose of making the measure more workable in its operation. That the Act was not passed for the benefit of the employer is self-evident when we consider that it takes from him his property without fault on his part and also takes his property to pay the obligations of other employers. The purpose of the Act is a public one with incidental benefits to the wage-workers as a class in that it provides for compensation for all injuries received by them in the course of their employment without regard to the fault of the person causing the injury; but the means of paying this compensation had to be provided. The

Act provides for its payment out of a fund which is created by contributions from employers in the way of premiums paid for policies of insurance. In order to afford immediate relief to the injured working man or his dependent beneficiaries in case of his death, it was necessary that these contributions should be readily and speedily made. It is obvious that this result can be better obtained by voluntary action on the part of the employer rather than by involuntary obedience to a direct command. In order to render this action voluntary it was necessary, notwithstanding the Act took from the employer his property without fault on his part and to pay the obligations of other employers, to yet make it to his interest and advantage to accept its provisions. This was done by the enactment that if he refused to accept its provisions and stood on his rights at common law he was deprived of all of his common law defenses. In other words, in the language of Mr. Justice Holmes in the Bank Depositors Guarantee Act cases (Noble State Bank v. Haskell, 219 U. S. 104; Shellenberger, Governor of Nebraska v. First State Bank of Holstein, 219 U. S. 114; Assaria State Bank v. Dolley, Bank Commissioner State of Kansas, 219 U. S. 121) the Act "brought about by the creation of motives less compulsory than command and of disadvantages of holding aloof less peremptory than an immediate stop the same result that it might have compelled by direct command." It was further held by the Supreme Court of the United States in Assaria State Bank v. Dolley, supra, that if an act mandatory in form can be constitutional it will likewise be constitutional if it be voluntary in form.

UNDER POINT II.

The Act not being retroactive nor affecting any vested interest and not being compulsory as to the employee, no question as to deprivation of his liberty or property can arise. As said by Chief Justice Phillips (Transcript of Record, pp. 49-51):

"Does this deprive the employee of any vested right or property right? It is clear that it takes from him no property right. A vested right of action given by the principles of the common law is a property right, and is protected by the Constitution as is other property. The Act, however, does not profess to deal with rights of action accruing before its passage. That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury. This is nothing more or less than a denial to him by the Legislature of certain rules of the common law for the future determination of the employer's liability to him for personal injuries incurred in the latter's service, and, in the plan of compensation provided, the substitution by the Legislature of another law governing such liability and providing a different remedy. The question is: Was the Legislature without the power to thus completely change the law upon the subject? This inquiry has no concern in the wisdom of the change; it takes no account of the reason for it; it is limited to the naked question of the Legislature's power.

"That the Legislature possessed the power, must be conceded, unless it be true that the employee is protected by the Constitution in the continuance of the rules of the common law for his benefit in the determination of the employer's liability for such injuries as those with which the Acts deals. That no one has a vested right in the continuance of the present laws in relation to a particular subject, is a fundamental proposition; it is not open to challenge. The laws may be changed

by the Legislature so long as they do not destroy or prevent an adequate enforcement of vested rights. There can not be a vested right, or a property right, in a mere rule of law.

"Here the character of injuries, or wrongs, dealt with by Act becomes important. Notwithstanding the breadth of some of its terms, its evident purpose was to confine its operation to only accidental injuries, and its scope is to be so limited. Its emergency clause declares its aim to be the protection by an adequate law of the rights of employees injured in 'industrial accidents,' and the beneficiaries of such employees as may be killed 'in such accidents.' The Bill of Rights, Section 13, Article I, of the Constitution provides that 'every person for any injury done him, in his lands, goods, person or reputation, shall have his remedy by due course of law;' that is, the right of redress in the courts of the land in accordance with the law's administration. It is therefore not to be doubted that the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed. This Act does not affect the right of redress for that class of wrongs. The injuries, or wrongs, with which it deals are accidental injuries or wrongs. What we know and denominate as the cause of action arising from an accidental injury is purely the creation of the common law. It is a common law liability founded upon the common law doctrine of negligence; and but for the rule of the common law—sometimes expressed in statutes—there would be no liability for such an injury, and hence no cause of action for it. Therefore in denying the employee of a subscribing employer, or his beneficiaries, any cause of action for accidental injuries, this Act simply changes the common law rule of liability upon the subject. It in effect declares that such employers shall no longer be liable as under that rule, but shall be liable according

to the rule prescribed by the Act. If the Legislature in the performance of its function of declaring what the law shall be, is authorized to change and repeal the rules of the common law upon other subjects, as is undoubted and has been done in numerous and notable instances, wherein is its power to change this common law rule to be denied? If it may entirely abrogate the common law rule of contributory negligence, thus relieving the employee of all consequence of his negligence, and transferring it, in effect, to the employer, what is there, as a matter of purely legislative authority, to prevent its relieving the employer of the consequence of his negligence and, in particular, the negligence of his servants, and determining that he shall compensate his employee for accidental injuries received in his service according to a different rule, through another remedy, and in its judgment by a better plan? If, in a word, it may declare that contributory negligence shall no longer be a defense, may it not also declare, as to purely accidental injuries, that negligence shall no longer be actionable? if it may change defensive common law rules, may it not also change a common law rule of liability? The power of the Legislature can not exist in the one instance and not in the other. In virtue of its authority to enact laws, and, in doing so, to supersede common law rules where it deems such action wise, it exists in both; and it was in our opinion therefore competent for the Legislature by this Act, to change both the common law rule of defenses and the common law rule of liability with respect to accidental injuries sustained by an employee in the course of his employment requiring the employer, if he elects to come under the Act, to provide, according to its plan, a fixed compensation to be paid the employee, or his beneficiaries if his injury results in death, and denying to the employee of an employer subject to the Act, or his beneficiaries, the right of recovery therefor according to common law rules. We rest the decision of this question upon what seems to us is the evident proposition that no one has any vested—or property in-

terest in the rules of the common law, and therefore no one is deprived of a constitutional right by their change through legislative enactment. Jensen v. Railway Company, 215 N. Y. 514; 109 N. E. 600. The alteration in the law worked by this Act may be marked, but that does not of itself affect the power of the Legislature to so write the law; and it is only with the question of its power that we are concerned. The bearing of Act upon the rights of employees, in its denial to those engaged in the service of a subscribing employer of a common law action for injuries so suffered, presents the vital constitutional question of the legislation. It is its abrogation of a familiar rule of liability that affords the chief challenge of its validity and not unnaturally prompts the test of the Constitution. But that instrument has not undertaken to preserve inviolate the rules of the common law. That system of rules to the extent that we are governed by it was adopted by the Legislature and the same authority may alter it. The right to have the liability of an employer for an accidental injury to an employee determined by a common law doctrine is not a constitutional immunity, and this Act in changing that rule of liability therefore invades no constitutional rights."

And as said by this Court in N. Y. C. R. Co. v. White, 243 U. S. 198-200:

"In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. Ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the Court of Appeals in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

"The close relation of the rules governing the responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L Ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L Ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Martin v. Pittsburg & L. E. R. Co., 203 U. S. 284, 294, 51 L Ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 50, 56 L. Ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago & A. R. Co. v. Tranberger, 238 U. S. 67, 76, 59 L. Ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense, safety appliance acts being a familiar instance. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. Ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 60 L. Ed. 874, 877, 878, 36 Sup. Ct. Rep. 482.

"The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim repondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is

answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

"The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. Co. (1841), 1 McMull. L. 385, 398, 36 Am. Dec. 268; Farwell v. Boston & W. R. Corp. (1842), 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; Hutchinson v. York, N. & B. R. Co. (1850), L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; Wigmore v. Jay (1850), L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; Bartonshill Coal Co. v. Reid (1858), 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107. And see Randall v. Baltimore & O. R. Co., 109 U. S. 478, 483, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Northern P. R. Co. v. Herbert, 116 U. S. 642, 647, 29 L. Ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinction as to grades and departments in the employment. See Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 650-653, 58 L. R. A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

"The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those

due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. Ed. 1062, 1070, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. Ed. 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

"So also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

"It may be added by way of reminder, that the entire matter of liability for death caused by wrongful act both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages."

UNDER POINTS III AND V.

It does not lie in the mouth of Middleton, who is shown by the record to have elected to come under the provisions of the Act, to complain that he was discriminated against by the same or that the Act deprived him of the equal protection of the laws. But his contention can be answered and we will answer it.

The Texas Employers' Liability Act treats alike all persons brought under subjection to it. No contention is made here that it does not do so. It is settled by this Court that that is all that is required by the concluding clause of the first section of the Fourteenth Amendment. The equal protection of the laws is afforded when that is accomplished. Minneapolis, etc. R. Co. v. Beckwith, 129 U. S. 26, 29; Barbier v. Connolly, 113 U. S. 27, 32; Soon Sing v. Crowley, 113 U. S. 703, 709; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 523; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205; Home Ins. Co. v. New York, 134 U. S. 607; Columbus, etc., Ry. Co. v. Wright, 151 U. S. 482; New York, etc., Ry. Co. v. Bristol, 151 U. S. 571; St. Louis, etc. Ry. Co. v. Matthews, 165 U. S. 25; Davis v. Massachusetts, 167 U. S. 47; Magoun v. Illinois Trust, etc., Bank, 170 U. S. 294; Tullis v. Lake Erie, etc., R. R., 175 U. S. 353; Powell v. Pennsylvania 127 U. S. 683; Mugler v. Kansas, 123 U. S. 663; Pembina Mining Co. v. Pennsylvania, 125 U. S. 190; Hodgson v. Vermont, 168 U. S. 242; Charlotte, etc., Ry. v. Gibbers, 142 U. S. 394; Pacific Express Co. v. Seibert, 142 U. S. 354; Holden v. Hardy, 169 U. S. 385; Orient Ins. Co. v. Daggs, 172 U. S. 562; St. Louis, etc., Ry. v. Paul, 173 U. S. 408.

Legislation does not infringe upon this clause of the Fourteenth Amendment merely because it is special in its character. It is well settled that this clause permits special legislation in all of its varieties; and if a law is in conflict at all with this provision it must be on other grounds. Missouri v. Lewis, 101

U. S. 22; Barbier v. Conolly, 113 U. S. 27, 32; Hays v. Missouri, 120 U. S. 68; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 209; Minneapolis, etc., R. Co. v. Herrick, 127 U. S. 210; Minneapolis, etc., Ry. Co. v. Beckwith, 129 U. S. 26, 28; Home Ins. Co. v. New York, 134 U. S. 594, 606; Duncan v. Missouri, 152 U. S. 377; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Clark v. Kansas City, 176 U. S. 114, 119.

"The Fourteenth Amendment was not designed to prevent the exercise of judgment by a State Legislature of what the interests of the State required and to compel it to run all its laws in the channels of general legislation. It may deem that social and business conditions without penal legislation afford ample protection to the public against wrong doing by certain officials, while such legislation may be deemed necessary for like protection against wrong doing by other officials charged with substantially the same duties." Bachtel v. Wilson, 204 U. S. 36, 42.

This provision of the Constitution does not invalidate legislation on the mere ground of inequality in actual result. The very idea of classification is that of inequality so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 106; Minneapolis, etc. R R. Co. v. Gano, 190 U. S. 557; Kidd v. Alabama, 188 U. S. 733; Fidelity Mut. Life Ins. Co. v. Mettler, 185 U. S. 376; Knoxville Iron Co. v. Harbison, 183 U. S. 22; Clark v. Kansas City, 176 U. S. 114, 120.

In Jeffrey Mfg. Co. v. Blagg, 235 U. S. 576, where the contention was made that the Ohio Workman's Compensation Act was obnoxious to the equal protection clause of the Fourteenth Amendment because employers having five or more employees who elected to remain without the plan were deprived in negligence suits of the defenses of contributory negligence, assumed risk and the negligence of fellow servants, while those

employing less than five were still privileged to make either or all of said defenses, this Court said:

"This Court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160 and previous cases in this Court cited on page 79. That a law may work a hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them ,and what shall be excluded. Classifications of industries with references to police regulations, based upon the number of employees, have been sustained in this Court. Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. Ed. 872, 22 Sup. Ct. Rep. 616. In that case, an inspection law of the state was sustained, which was applicable only to mines employing five men or more at any one time. This case was cited with approval, and its doctrine applied, in McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 29 Sup. Ct. Rep. 206, where a law regulating the payment of wages in coal mines in Arkansas was sustained, though made applicable only where not less than ten miners were employed.

"Certainly in the present case there has been no attempt at unjust and discriminatory regulation. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the state.

"No employer is obliged to go into this plan. He may stay out of it altogether if he will. Not opening the door of the statute to those employing less than five, still leaving them to the obligation and rules of the common and existing statute law, the legislature may have believed that, having regard to local conditions, of which they must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it, and embraced all the establishments of the state of any size, and that those so small as to employ only four or less might be regarded as a negligible quantity, and need not be assessed to make up the guaranty fund, or covered by the methods of compensation which are provided by this legislation. This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five or more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five or more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it; but if the state has the right to pass police regulations based upon such differences—and this Court has held that it has—we must look to the general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours."

The Act very properly exempts employees of any person, firm, or corporation operating any railway as a common carrier for the reason that as to employers and employees of railways

engaged in inter-state commerce, the subject was covered by the Federal Employers' Liability Act; and as to those engaged in intra-state commerce, the subject was already covered by State legislation.

Article 6640, Vernon's Salyes' Statutes, provides:

"Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employee of such person, receiver or corporation, and the fact that such servants or employees were fellow-servants with each other shall not impair or destroy such liability."

Article 6645: "WHEN ASSUMED RISK NOT AVAILABLE AS DEFENSE.—In any suit against a person, corporation, or receiver, operating a railroad or street railway, for damages for the death or personal injury of an employee or servant, that the plea of assumed risk of the deceased or injured employee where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases:

"First: Where such employee had an opportunity before being injured or killed to inform the employer, or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify, or cause to be notified, the employer, or superior thereof, within a reasonable time; provided, it shall not be necessary to give such information where the employer, or such superior thereof, already knows of the defect.

"Second: Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employee give notice of the defect as provided in subdivision one of this article."

Article 6709: "EQUIPMENTS TO BE USED; COMMISSION TO SUPERVISE.—It shall be unlawful for any common carrier engaged in intrastate commerce by railroad within the State of Texas to use on its lines in moving intrastate traffic within said state any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose, or to run any train in such traffic that has not all of the power or train brakes in it used and operated by such engineer, or to run any train in such traffic that has not at least seventy-five per centum of the cars in it equipped with power or train brakes; and for the purpose of fully carrying into effect the objects of this and the five succeeding articles, the railroad Commission of Texas may, from time to time, after full hearing by public order, increase the minimum percentage of cars in any train which shall be equipped with power or train brakes; and after such minimum percentage has been so increased it shall be unlawful for any common carrier to run any train in such traffic which does not comply with such increased minimum percentage."

Article 6710: "IMPROVED COUPLERS TO BE USED.—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to haul or permit to be hauled or used on its line of railroad within the State of Texas, any locomotive, tender, car or similar vehicle employed in moving intrastate traffic within the said state which is not equipped

with couplers, coupling automatically by impact, and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, cars and similar vehicles."

Article 6711: "DRAWBAR OF ENGINE, LENGTH OF.—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to use in the moving of any intrastate traffic within said state any locomotive, tender, car, or similar vehicle, any drawbar of which, when measured perpendicularly from the level of the tops of the track rails upon which such locomotive, tender, car or similar vehicle is standing to the center of such drawbar, is more than thirty-four and one-half inches in height, or less than thirty-one and one-half inches in height."

Article 6713: "ROLLING STOCK TO BE PROVIDED WITH GRAB IRONS, Etc.—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to use in moving intrastate commerce within said state any locomotive, tender, cars, or similar vehicle which is not provided with sufficient and secure grab irons, hand holds and foot stirrups."

Article 6646: "NO ASSUMED RISK WHERE SAFETY APPLIANCE NOT PROVIDED.—Any employee of any common carrier engaged in any intrastate commerce, as provided in articles 6709, 6710, 6711 and 6713, who may be injured or killed shall not be held to have assumed the risk of his employment, or to have been guilty of contributory negligence, if the violation of such carrier of any of the provisions of said articles contributed to the injury or death of such employee."

Article 6648: "LIABLE FOR INJURY OR DEATH OF EMPLOYEE.—Every corporation, receiver or other person, operating any railroad in this state, shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad, or in case of the death

of such employee, to his or her personal representative for the benefit of the surviving widow and children, or husband and children, and mother and father of the deceased, and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier; or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment; provided the amount recovered shall not be liable for the debts of deceased and shall be divided among the persons entitled to the benefit of the action or such of them as shall be alive, in such shares as the jury, or court trying the case without a jury, shall deem proper; and provided, in case of the death of such employee, the action may be brought without administration by all parties entitled thereto, or by any one or more of them for the benefit of all, and, if all parties be not before the Court, the action may proceed for the benefit of such parties as are before the Court."

Article 6649: "CONTRIBUTORY NEGLIGENCE, RULE AS TO.—In all actions hereinafter brought against any such common carrier or railroad under or by virtue of the foregoing article and the three succeeding articles to recover damages for personal injuries to the employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Article 6650. "ASSUMED RISK, RULE AS TO.—Any action brought against any common carrier under or by virtue

of any of the provisions of the two preceding articles to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Act in question, Section 1, Part I, provides:

"In an action to recover damages for personal injury sustained by an employee in the course of his employment or for death resulting from personal injury so sustained, it shall not be a defense:

"(1) That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in proportion to the amount of negligence attributable to such employee, provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence where the violation of such employer of any statute enacted for the safety of the employee contributed to the injury or death of such employee.

"(2) That the injury was caused by the negligence of a fellow employee.

"(3) That the employee had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the wilful intention of the employee to bring about the injury.

"(4) Provided however, in all such actions against an employer who is not a subscriber as defined hereafter in this Act, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment" (Plaintiff in error's brief, pp. 37, 38).

It is thus apparent that by the terms of the Act, employers

and employees who elect to remain without its provisions and to stand upon their rights at common law in actions to recover damages for personal injuries sustained by an employee in the course of his employment are placed upon the same footing upon which the Legislature had previously placed employers and employees of railways engaged in intrastate business; and that the Legislature considered that as to such railways and as to employers without the Act, the remedy provided by the common law to employees who suffered personal injury in the course of employment was adequate with the employer's defenses of assumed risk, contributory negligence and negligence of fellow servants removed.

No complaint is made by plaintiff in error of the exemption by the Act of domestic servants, farm laborers and employees of any person, firm, or corporation having in his or their employ not more than five employees; but he does say something about the exemption of laborers engaged in working for a cotton gin. This Court probably judicially knows that in the South, cotton gins are a part of the agricultural industry of the country. Cotton gins are not found in cities or manufacturing centers but out in the country where the cotton grows. The machinery of a cotton gin is not complicated—certainly not more so than that of a reaper and binder, or a threshing machine—its operation requires no special knowledge or skill. Unquestionably, had laborers engaged in working for a cotton gin not been specifically named in the statute, the courts, in construing the Act, would have classed them with farm laborers. The objection to the exemption of laborers engaged in working for a cotton gin could as well be made to that of farm laborers or domestic servants; it is frivolous.

UNDER POINT IV.

As hereinbefore pointed out, the Act is not compulsory as to the employees of a "subscriber." Plaintiff in error's point and argument herein are therefore bottomed upon a false premise; however, his contention that the Act deprives the employees of a "subscriber" of the right of freedom of contract is answered by the pronouncement of this Court in New York Central R. Co. v. White, 243 U. S. 205-207, as follows: "But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this Court. The first is this: "Included in the right of personal liberty and the right of private properey—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." Coppage v. Kansas, 236 U. S. 1, 14, 59 L. Ed. 441, 446, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure." Truax v. Raich, 239 U. S. 33, 41, 60 L. Ed. 131, 135, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measureably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable on that ground. And for this reason: The subject matter in respect of which freedom of

contract is restricted is the matter of compensation for human life or limb lost, or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer." Holden v. Hardy, 169 U. S. 366, 397, 42 L. Ed. 780, 793, 18 Sup. Ct. Rep. 383. It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared in bills of rights, to be "natural and inalienable;" and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 571, 55 L. Ed. 328, 340, 31 Sup. Ct. Rep. 259; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 52, 56 L. Ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

IN CONCLUSION.

It is apparent that the criticisms levelled against the Texas Act by plaintiff in error are in fact aimed at the scheme of legislation as expressed in workmen's compensation laws. But the Courts of last resort in the several states and this Court have steadfastly refused to view the subject from the bottom of a well; they have pushed back the horizon and treated the question from the broad view-point of the public good. Plaintiff in error's lament is, not that the Texas Act is obnoxious to the Fourteenth Amendment to the Federal Constitution but, that there is a Texas Workman's Compensation Act at all. Viewing the question from the standpoint of his own selfishness he desires the opportunity of a generous jury verdict afforded him in a suit at common law for damages. In the old days of manual labor and of the small shop with few employees when the master not only labored by the side of the servant but the apprentice lived with and was a part of the family of the master; in the days of the stage-coach; the remedy provided by the common law for injuries suffered by the servant in the course of employment was fairly adequate. Accidents there were in those days and distressing ones, but they were relatively few and the servant who exercised a reasonable degree of care was comparatively secure from injury; but in these days of steam, electricity and of machinery when the employees of one master are numbered by the thousand; when the master does not work with nor exercise an over-seeing care over the servant; when old methods of manufacturing and even many of the old industries have become obsolete and been superseded by rapid, complicated and hazardous methods growing out of the improvement directed toward the cheapening of products, those who have given the subject consideration have long been convinced that the common law remedy affording compensation to workmen for injuries received in the course of employment is totally inadequate, results in great economic waste, and utterly fails to

meet the great economic and social problem which the industrialism of the present day has forced upon us; namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism, stalking through the modern world like a Frankenstein, levies and must continue to levy upon mankind. Economic facts established through the last twenty-five years show that the cause of from fifty to fifty-five per cent of the accidents to workingmen injured or killed in the course of their employment is due to the natural hazard of the business, i. e., to the inevitable risks of the business plus the combined negligence of the employer and the employee; that not to exceed eighteen to twenty per cent of the causes of such accidents are proximately due to the negligence of the employer; that not to exceed twenty-five to thirty per cent of the causes of such accidents are attributable to the negligence of the workmen; therefore, the common law action based upon the fault of the employer only presumes in theory to furnish compensation of any kind in less than twenty per cent of the cases, while in fact, statistics show that on the average in the United States compensation is actually paid in less than twelve per cent of the cases. Established facts further show that upwards of 600,000 employees in industrial employments are injured and killed annually in the course of employment in the United States; as these men ordinarily have no means, the breadwinner of the family, with no capital but the labor of his own hands, being stricken down with a permanent injury or in death, the family without a penny being left to face the rent man, the grocery man and the fuel man, the question has become one of public concern and therefore for consideration by the State; from which viewpoint, it being the same whether the injuries suffered by workmen are attributable to the negligence of the employer or to that of the employee or to that of a fellow workman or are caused by the natural hazard of the business, the problem presented to the statesmanship of the country has been what measure should be

taken in the interest of the public good and to the satisfaction of the public need to provide compensation for the one hundred per cent of the injured rather than for the twenty, or more properly speaking, the twelve per cent provided for by the remedy afforded by the common law. As said by Mr. Justice Brandeis in his dissenting opinion in New York Central R. Co. v. Winfield, 244 U. S. 147: "It is the State which is both primarily and ultimately concerned with the care of the injured and those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency if provision be not otherwise made. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and a denial of opportunity. Upon the State also rests under our dual system of government the duty owed to the individual to avert misery and promote happiness;" and as said by Mr. Justice Pitney, the organ of this Court in New York Central R. Co. v. White, supra: "The pecuniary loss resulting from the employees' death or disablement must fall somewhere; it results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the Act, in effect, disregards the proximate cause and looks to one more remote —the primary cause as it may be deemed—and that is the employment itself. For this both parties are responsible since they voluntarily engage in it as co-adventurers with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the law-maker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security.

And it is evident that the consequences of a disabling or a fatal injury are precisely the same to the parties immediately affected and to the community whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death, to those who were entitled to look to him for support in lieu of the common law liability confined to cases of negligence."

We submit the case and pray that the judgment of the Texas Court be in all things affirmed.

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MIDDLETON *v.* TEXAS POWER & LIGHT COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 102. Submitted December 18, 1918.—Decided March 3, 1919.

There is a strong presumption that discriminations in state legislation are based on adequate grounds, and the mere fact that a law regulating certain classes might properly have included others does not condemn it under the equal protection clause. P. 157.

The Texas Workmen's Compensation Act, regulating the rights and

liabilities of employers and employees respecting disabling and fatal injuries in the employment, is expressly inapplicable to domestic servants, farm laborers, common carrier railway employees, laborers in cotton gins and employees of employers employing not more than five. *Held*, that there are adequate grounds for each of these exceptions. *Id.*

The discrimination resulting between employees engaged in the same kind of work, where one employer exercises his option to come under the act and another does not, is likewise consistent with the equal protection clause. P. 159.

Construed as binding all employees who remain in the employment after notice that their employer has subscribed to compensation insurance under it, the act is not open to the objection of being optional to the employer while compulsory upon his employees when he accepts it, since the latter, by thus remaining, exercise their option also. P. 161.

As the status of employer and employee is voluntary, and in view of their different relations to the common undertaking, it is clearly within legislative discretion, and not a denial of equal protection, to leave the initiative to the former in adopting the new terms of employment, with the option to the latter of accepting them, too, after notice, or withdrawing from the service. *Id.*

A plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries, irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers, without depriving either of liberty in violation of the due process clause. P. 163.

108 Texas, 96, affirmed.

THE case is stated in the opinion.

Mr. Chas. B. Braun for plaintiff in error.

Mr. Harry Preston Lawther and *Mr. Alexander Pope* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Alleging that in the month of December, 1913, he was in the employ of the Texas Power and Light Company in the

State of Texas, and while so employed received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents, Middleton sued the company in a district court of that State to recover his damages. The defendant interposed an answer in the nature of a plea in abatement setting up that at the time of the accident and at the commencement of the action defendant was the holder of a policy of liability and compensation insurance, issued in its favor by a company lawfully transacting such business in the State, conditioned to pay the compensation provided by the Texas Workmen's Compensation Act, which was approved April 16, 1913, and took effect on the first day of September in that year (c. 179, Acts of 33d Legislature), of which fact the plaintiff had proper and timely notice as provided by the act; and that no claim for the compensation provided in the act with respect to the alleged injury had been made by plaintiff, but on the contrary he had refused to receive such compensation; with other matters sufficient to bring defendant within the protection of the act. Plaintiff took a special exception in the nature of a demurrer, upon the ground (among others) that the act was in conflict with the Fourteenth Amendment to the Constitution of the United States. The exception was overruled, the plea in abatement sustained, and the action dismissed. On appeal to the court of civil appeals it was at first held that the judgment must be reversed (178 S. W. Rep. 956); but upon an application for a rehearing the constitutional questions were certified to the supreme court of the State. That court sustained the constitutionality of the law (108 Texas, 96); and in obedience to its opinion the court of civil appeals set aside its former judgment and affirmed the judgment of the district court. Thereupon the present writ of error was sued out under § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

Thus we have presented, from the standpoint of an objecting employee, the question whether the Texas Employers' Liability Act is in conflict with the due process and equal protection provisions of the Fourteenth Amendment.

The act creates an Employers' Insurance Association, to which any employer of labor in the State, with exceptions to be mentioned, may become a subscriber; and out of the funds of this association, derived from premiums on policies of liability insurance issued by it to subscribing members and assessments authorized against them if necessary, the compensation provided by the act as due on account of personal injuries sustained by their employees, or on account of death resulting from such injuries, is to be paid. This is a stated compensation, fixed with relation to the employee's average weekly wages, and accrues to him absolutely when he suffers a personal injury in the course of his employment incapacitating him from earning wages for as long a period as one week, or to his representatives or beneficiaries in the event of his death from such injury, whether or not it be due to the negligence of the employer or his servants or agents. Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employee, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employee of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer. Employers who do not become subscribers are subject as before to suits for damages based on negligence for injuries to employees or for death resulting therefrom, and are deprived of the so-called "common law defenses" of fellow servant's negligence and assumed risk, and also of contributory

negligence as an absolute defense, it being provided that for contributory negligence damages shall be diminished except where the employer's violation of a statute enacted for the safety of employees contributes to the injury or death; but that where the injury is caused by the willful intention of the employee to bring it about the employer may defend on that ground. Every employer becoming a subscriber to the insurance association is required to give written or printed notice to all his employees that he has provided for the payment by the association of compensation for injuries received by them in the course of their employment. Under certain conditions an employer holding a liability policy issued by an insurance company lawfully transacting such business within the State is to be deemed a subscriber within the meaning of the act. There are administrative provisions, including procedure for the determination of disputed claims. By § 2 of Part 1 it is enacted as follows: "The provisions of this Act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees."

Following the order adopted in the argument of plaintiff in error, we deal first with the contention that the act amounts to a denial of the equal protection of the laws. This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges which by the act are denied to employees of the non-excepted classes, without reasonable basis for the distinction.

Of course plaintiff in error, not being an employee in

any of the excepted classes, would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576. But plaintiff in error sets up a grievance as a member of a class to which the act is made to apply.

However, we are clear that the classification can not be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Texas, 110–111): "Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the Act, but this was doubtless for reasons that the legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the legislature in exempting them from the operation of the Act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not

amount to a constitutional objection. *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, 649–650; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 215; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 384.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employees, the existence of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach (*New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170), and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury (see *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 151–152; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 259–260; *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478; *New York Central R. R. Co.* v. *Carr*, 238 U. S. 260, 263; *Pennsylvania Co.* v. *Donat*, 239 U. S. 50; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 559; *Louisville & Nash. R. R. Co.* v. *Parker*, 242 U. S. 13; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, 306; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 573), reasonably may have led the legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statu-

tory modifications already in force (Vernon's Sayles' Texas Civ. Stats. 1914, Arts. 6640–6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York Workmen's Compensation Act was sustained in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 208, upon the ground that the legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar. The same result has been reached by the state courts generally. *Opinion of Justices*, 209 Massachusetts, 607, 610; *Young* v. *Duncan*, 218 Massachusetts, 346, 349; *Hunter* v. *Colfax Coal Co.*, 175 Iowa, 245, 287; *Sayles* v. *Foley*, 38 R. I. 484, 490–492. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the supreme court of that State, as we have seen. And the exclusion of domestic servants, farm laborers, casual employees, and railroad employees engaged in interstate commerce was sustained in *Mathison* v. *Minneapolis Street Ry. Co.*, 126 Minnesota, 286, 293.

The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576–577, and has been sustained repeatedly by the state courts. *State* v. *Creamer*, 85 Ohio St. 349, 404–405; *Borgnis* v. *Falk Co.*, 147 Wisconsin, 327, 355; *Shade* v. *Cement Co.*, 93 Kansas, 257, 259; *Sayles* v. *Foley*, 38 R. I. 484, 491, 493.

The discrimination that results from the operation of the

act as between the employees of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of their right to agree upon the terms of employment. And see *Borgnis* v. *Falk Co.*, 147 Wisconsin, 327, 354; *Mathison* v. *Minneapolis Street Ry. Co.*, 126 Minnesota, 286, 294.

In recent years many of the States have passed elective workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer. *Sexton* v. *Newark District Telegraph Co.*, 84 N. J. L. 85; 86 N. J. L. 701; *Opinion of Justices*, 209 Massachusetts, 607; *Young* v. *Duncan*, 218 Massachusetts, 346; *Borgnis* v. *Falk Co.*, 147 Wisconsin, 327; *State* v. *Creamer*, 85 Ohio St. 349; *Deibeikis* v. *Link-Belt Co.*, 261 Illinois, 454; *Crooks* v. *Tazewell Coal Co.*, 263 Illinois, 343; *Victor Chemical Works* v. *Industrial Board*, 274 Illinois, 11; *Mathison* v. *Minneapolis Street Ry. Co.*, 126 Minnesota, 286; *Shade* v. *Cement Co.*, 93 Kansas, 257; *Sayles* v. *Foley*, 38 R. I. 484; *Greene* v. *Caldwell*, 170 Kentucky, 571; *Hunter* v. *Colfax Coal Co.*, 175 Iowa, 245. The Ohio law was sustained by this court against special

attacks in *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576, and the Iowa law in *Hawkins* v. *Bleakly*, 243 U. S. 210, 213, *et seq.*

Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the State to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking

satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the State in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the State to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment.

This disposes of all contentions made under the equal protection clause.

It is argued further that there is a deprivation of liberty and property without due process of law in requiring employees, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property

in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of *respondeat superior*, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 198–206; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 234.

All objections to the act on constitutional grounds being found untenable, the judgment under review is

Affirmed.